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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BLACKWATER LODGE AND TRAINING CENTER, INC., a Delaware Corporation dba BLACKWATER WORLDWIDE, Plaintiff, v. KELLY BROUGHTON, in his capacity as Director the Development Services Department of the City of San Diego; THE DEVELOPMENT SERVICES DEPARTMENT OF THE CITY OF SAN DIEGO, an agency of the City of San Diego; AFSANEH AHMADI, in her capacity as the Chief Building Official for the City of San Diego; THE CITY OF SAN DIEGO, a municipal entity; and DOES 1-20, inclusive, Defendants.	Case No. 08 CV 0926 H (WMC) **NOTICE OF MOTION AND DEFENDANTS' JOINT MOTION TO DISMISS PLAINTIFF'S COMPLAINT** **[FRCP RULE 12(b)(6)** Date: July 21, 2008 Time: 10:30 a.m. Courtroom: 13 Judge: Hon. Marilyn L. Huff

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TO PLAINTIFF AND TO ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on July 21, 2008, at 10:30 a.m. in Courtroom 13 of the above entitled court located at 940 Front Street, San Diego, California, or as soon thereafter as the matter may be heard, the defendants KELLY BROUGHTON, THE DEVELOPMENT SERVICES DEPARTMENT OF THE CITY OF SAN DIEGO, AFSANEH AHMADI, and THE CITY OF SAN DIEGO (collectively "City Defendants") will move this court to dismiss the entirety of Plaintiff's Complaint for failure to state a cognizable claim for which relief may be granted. More specifically, the City Defendants assert Plaintiff's Claims for: (1) Injunctive Relief; (2) Declaratory Judgment; (3) Violation of 42 USC§1983 (Procedural Due Process); (4) Violation of 42 USC§1983 (Equal Protection); (5) Dormant Commerce Clause; (6) Violation of California Constitution Art. I §7(A) (Procedural Due Process); and (7) Violation of California Constitution Art. I §7(A) (Equal Protection) are without legal merit, are not ripe, and fail to state a claim for which relief may be granted by this Court. The City Defendants bring their motion pursuant to Federal Rules of Civil Procedure, Rule 12 (b)(6).

This motion will be based on this notice and motion, the City Defendants' memorandum of points and authorities in support thereof, as well as the request for judicial notice, the declaration of Afsaneh Ahmadi and attached exhibits, and such other matters of which the Court may take judicial notice, the pleadings, records, and files herein, and any evidence or argument presented at the hearing on this motion.

Respectfully submitted,

Dated: June 23, 2008

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BLACKWATER LODGE AND TRAINING CENTER, INC., a Delaware Corporation dba BLACKWATER WORLDWIDE, Plaintiff, v. KELLY BROUGHTON, in his capacity as Director the Development Services Department of the City of San Diego; THE DEVELOPMENT SERVICES DEPARTMENT OF THE CITY OF SAN DIEGO, an agency of the City of San Diego; AFSANEH AHMADI, in her capacity as the Chief Building Official for the City of San Diego; THE CITY OF SAN DIEGO, a municipal entity; and DOES 1-20, inclusive, Defendants.	Case No. 08 CV 0926 H (WMC) **DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF JOINT MOTION TO DISMISS PLAINTIFF'S COMPLAINT** Date: July 21, 2008 Time: 10:30 a.m. Courtroom: 13 Judge: Hon. Marilyn L. Huff

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I. INTRODUCTION

Defendants CITY OF SAN DIEGO ("City"), the City's DEVELOPMENT SERVICES DEPARTMENT ("DSD"), KELLY BROUGHTON ("Broughton") and AFSANEH AHMADI ("Ahmadi") (collectively "City Defendants") hereby move to dismiss the Complaint of Plaintiff BLACKWATER LODGE AND TRAINING CENTER'S *dba* BLACKWATER WORLDWIDE ("Blackwater") pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure ("FRCP"). The City Defendants respectfully submit that Plaintiff's Complaint warrants dismissal because it has failed to set forth justiciable federal claims.

Specifically, Blackwater has failed to state a 42 U.S.C. § 1983 violation because its Complaint does not state a claim based on violation of procedural due process, or of either the Equal Protection or Dormant Commerce Clauses. Furthermore, without any federal basis for jurisdiction, this Court should not exercise jurisdiction over the Blackwater's state law claims. In addition, since this matter arises under a local land use determination, this Court should abstain from exercising jurisdiction until the decision-making process has run its course and further gives rise to a federal claim, if any. Furthermore, Plaintiff has asserted state law claims that independently have not complied with applicable claims requirements and otherwise do not constitute violations under the California Constitution.

II. PROCEDURAL HISTORY

On May 23, 2008, Blackwater filed its complaint against the City Defendants for (1) Injunctive Relief; (2) Declaratory Judgment; (3) Violation of 42 USC§1983 (Procedural Due Process); (4) Violation of 42 USC§1983 (Equal Protection); (5) Dormant Commerce Clause; (6) Violation of California Constitution Art. I §7(A) (Procedural Due Process); and (7) Violation of California Constitution Art. I §7(A) Equal Protection). (Doc. 1.)[1] On May 27, 2008, Blackwater applied *ex parte* for a temporary restraining order ("TRO") contending Blackwater would suffer irreparable harm if it was not able to begin use of a warehouse located at 7685 Siempre Viva Road (the "Building") in the City's planned Otay Mesa Development District ("OMDD") to train

[1] All citations to the pleadings filed thus far in this case refer to the numerical ordering in the Court's docket. The Court is respectfully requested to take judicial notice of its own files and records in this matter.

U.S. Navy personnel in "Security Reaction Forces" training. (Doc. 1: ¶¶ 1, 23-24.) Blackwater's TRO application was granted on June 4. 2008.

On June 17, 2008, this Court granted a Preliminary Injunction enjoining the City from refusing to perform the ministerial task of issuing certificates of occupancy to Blackwater for those portions of the Building the City had processed and approved building permits. (Docs. 32, 33.) The City was further directed to promptly process any other pending permits for the Building. (Doc. 32, 17:9-12; Transcript of Proceedings, Doc. 35, 103:1-10.) On June 18, 2008, the City appealed the Court's order granting the Preliminary Injunction to the Ninth Circuit. (Doc 34). The City Defendants herein file their joint Motion to Dismiss Plaintiff's Complaint for failure to state any cognizable claim upon which relief may be granted.

III. BLACKWATER'S CLAIMS

Blackwater alleges that earlier this year it secured the right to use the Building located in the City's OMDD to train Navy sailors. (Complaint, Doc.1, 2:1-15.) Blackwater claims it then applied, individually, for building permits to add internal walls, add air conditioning units and to add an insulated firing range. (Doc. 1, ¶1, 2:17-20.) Blackwater further alleges that it was harmed when Broughton, the City's DSD Director, informed Blackwater that further land use review for the Building would be required because the Building had only been used previously as a warehouse, much of which remained identified for warehouse use, and no appropriate discretionary review of the change of use of the Building to a military training center had been yet completed, notwithstanding the City's processing of the previously-mentioned building permits. (TRO Application, Doc. 4, 11:6-13.)

Blackwater claims the City took this action, not as a result of the City's legitimate police power and regulatory land use authority under the OMDD, but because "self-proclaimed activists" complained loudly that the Blackwater operation was nothing more than "mercenaries" intent upon conducting covert border operation in close proximity to the Mexican border. Blackwater conjectured that because this is an election year, the City's Mayor and City Attorney prompted the Broughton to take this action to "curry favor" with the activists in an attempt to get re-elected. (Doc. 1, 3:11-21).

Blackwater's pleadings admit that its "professionals" are "military and law enforcement veterans dedicated to training military law-enforcement personnel" in the U.S. and to "protecting U.S. dignitaries abroad." (Doc. 1, ¶19, 6:25-27.) Another admitted key function of Blackwater is to protect U.S. diplomats in Iraq. (Doc. 1, ¶19, 6:27-28.) A far lesser known function is that Blackwater provides training for the U.S. Navy. (Doc.1, ¶20, 7:8-9.) Blackwater claims it should not be required to obtain an Otay Mesa Development Permit for use of the Building as a military training facility because "vocational schools" are a permitted use within the OMDD and it is merely operating a "vocational school." (Doc. 1, ¶25, 8:13-17; ¶¶35-37, 11:5-12:6).

Blackwater further contends that it has a clear and present right to occupy the Building. Blackwater's First Claim for Relief, therefore, seeks injunctive relief to obtain Certificates of Occupancy for the Building and an order enjoining the City and its officials from refusing to issue them for any reason, including additional discretionary reviews. (Doc. 1, 18:12-28.) Blackwater's Second Claim for Relief seeks a declaration that any withholding of the Certificates of Occupancy are unlawful. (Doc. 1, 19:12-15). Blackwater's Third and Fourth Claims for Relief for violation of its federally protected Due Process and Equal Protection rights seeks the appropriate declaratory and injunctive relief against the City Defendants, as well as damages, the cost of suit, and statutory interest. (Doc. 1, 20:25-28; 22:9-12). Blackwater's Fifth Claim for Relief seeks declaratory and injunctive relief for violation of the Dormant Commerce Clause because Blackwater contends the City Defendants have imposed regulatory measures on Blackwater in a manner designated to benefit in-state economic interests by burdening it as an out-of-state competitor that are not imposed on local entities. (Doc. 1, 23: 25-28.) Finally, Blackwater's Sixth and Seventh Claims for relief claims the City Defendants, acting under color of state law, seek to deprive Blackwater of procedural due process and equal protection under Article I, §7(a) of the California Constitution. (Doc. 1, 23:25-28; 26:23-28.)

Blackwater contends this Court also has diversity jurisdiction because Blackwater is a Delaware corporation with its principal place of business in North Carolina. (Doc.1, 5:17-18). It claims this court has subject matter jurisdiction under 28 USC§§ 1331 and 1343. (Doc.1, 5:13-14.) It further asserts that this court should assert supplemental jurisdiction over the state law claims because the state law claims are "so related" to the federal claims that that they form the same case and controversy under Article III of the United States Constitution. (Doc.1, 5:21-25.) The City Defendants respectfully disagree and, for the reasons below, respectfully moves this Court to dismiss Blackwater's Complaint.

IV. LEGAL ARGUMENT

A. DEFENDANTS' RULE 12 (b)(6) MOTION IS PROPER TO TEST THE LEGAL SUFFICIENCY OF CLAIMS SET FORTH IN BLACKWATER'S COMPLAINT

A FRCP Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in a complaint filed in federal court. Dismissal under Rule 12(b)(6) is proper where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d. 696, 699 (9th Cir. 1990). The issue on a motion to dismiss for failure to state a claim is not whether the claimant will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims asserted. *Gilligan v. Jamco Development Corp.*, 108 F.3d 246, 249 (9th Cir. 1997).

When evaluating a Rule 12(b)(6) motion, it is well settled that this Court must accept all material allegations in the complaint as true and construe them in the light most favorable to the non-moving party. *Barron v. Reich*, 13 F.3d 1370, 1374 (9th Cir. 1994). The court is not required, however, to accept "conclusory legal allegations cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994.) Dismissal of a claim is always proper where the federal claim is "immaterial and made solely for the purpose of obtaining federal jurisdiction" or where the "claim is wholly insubstantial and frivolous." *Steel Co. v. Citizens for a Better Environment,* 523 US 83, 89 (1998); *Roberts v. Corrothers*, 812 F2d 1173, 1177 (9th Cir. 1987).

For the reasons outlined below, the City Defendants respectfully assert that Blackwater chose not to avail itself of State and local law, preferring instead to seek federal jurisdiction on questionable grounds as a means of gaining a decided advantage in an effort to obtain a more favorable result. To this end, Blackwater's approach has already resulted in a premature adjudication granting injunctive relief, when its Complaint, and every claim for relief set forth therein, was not ripe for this Court's consideration.

B. THE COURT MAY CONSIDER MATTERS OUTSIDE THE PLEADINGS IN THIS CASE WHEN RULING ON DEFENDANTS' RULE 12(b)(6) MOTION

While a district court must normally ignore those matters that lie outside the pleadings, it may consider documents physically attached to the complaint, or documents of undisputed authenticity that are alleged or referenced within the complaint. *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998). A document is not considered "outside the pleadings" for purposes of Rule 12(b) "if the complaint specifically refers to the document and if its authenticity is not questioned." *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994). When a plaintiff fails to introduce a pertinent document as part of his pleading, the defendant may introduce the exhibit as part of his motion attacking the pleadings. Documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleadings, may be considered in ruling on a Rule 12(b) motion to dismiss. *Id.* at 453-54. Furthermore, when the Court's jurisdiction is at issue, this Court may consider extrinsic evidence when ruling on a motion to dismiss. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982 (9th Cir. 2007).

Thus, when ruling on the City Defendants' motion to dismiss this Court may consider the full texts of documents the complaint references only in part. *Fecht v. The Price Co.*, 70 F.3d 1078, 1080 n.1. (9th Cir. 1995); *cert. denied,* 517 U.S. 1136 (1996); *In re Stac Electronics Sec Litig.,* 89 F.3d 1399, 1405 n.4 (9th Cir. 1996). The Court may also take judicial notice of public records outside the pleadings, as well as of records and reports of administrative bodies. FRE 201(b); *MGIC Indem Corp. v. Weisman,* 80 F.2d 500, 504 (9th Cir. 1986). Therefore, in this case, it is proper for the Court to consider all documents referenced in Blackwater's complaint, as well as all documentary evidence submitted in support of its request for injunctive relief.

C. BLACKWATER'S CLAIMS ARE NOT RIPE FOR REVIEW

Article III of the U.S. Constitution further limits the jurisdiction of federal courts to actual cases or controversies. U.S. Const., art. III, §2. Therefore, as a threshold issue, the Court must first consider whether Plaintiff's claims are ripe for judicial consideration. *Lujan v. Defenders of*

Wildlife, 504 U.S. 555, 559-60 (1992). Ripeness is a doctrine of justiciability that dictates ***when*** review is appropriate. A claim that is not yet "ripe" is not justiciable and thus may be dismissed without prejudice under FRCP Rule 12(b)(1) for lack of federal question jurisdiction. *Association of American Med. Colleges v. United States*, 217 F.3d 770, 784, n.9 (9th Cir. 2000).

When evaluating whether a claim is "ripe" the Court must consider (1) whether the issues are yet fit for judicial decision and (2) the hardship to the parties of withholding court consideration. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), *abrogated on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977). *Also see*, *Nat'l Rifle Ass'n v. Magaw*, 132 F.3d 272, 284 (6th Cir.1997). Stated differently, review of a government agency's action, such as in this matter, is only ripe for review if the issues presented are purely legal and final agency action has been achieved. *Anchorage v. United States*, 980 F.2d 1320, 1323 (9th Cir.1992).

The core question is whether the agency has ***completed its decision-making process***, and whether the result of that process will affirmatively affect the parties, rather than prospectively or possibly affect them in the future. *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992). The Court must consider whether: 1) the administrative action is a definitive statement of an agency's position; 2) the action has a direct and immediate effect on the complaining parties; 3) the action has the status of law; and 4) the action requires immediate compliance with its terms. *See*, *Mt. Adams Veneer Co. v. United States*, 896 F.2d 339, 343 (9th Cir. 1989). *Also see*, *Anchorage*, *supra*, 980 F.2d at 1323.

In this case, therefore, before Plaintiff's claims can be said to be "ripe" or justiciable, the City must first be given the opportunity to "arrive[ ] at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Williamson County v. Hamilton Bank*, 473 U.S. 172, 191 (1985). As a threshold matter, the Court must determine "whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties' respective claims." *Magaw*, *supra*, 132 F.3d at 284. In the absence of a factual record to demonstrate ***final agency action***, the Court is without the power to yet adjudicate the matter.

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In short, any judicial determination in this case would be premature until such time as the City has completed its regulatory land use zoning review of the appropriateness of the Building as a military training facility, rather than simply an industrial warehouse.

D. EVEN IF BLACKWATER'S CLAIMS WERE JUSTICIABLE, THIS COURT SHOULD ABSTAIN FROM ENTERTAINING ITS CLAIMS

There are two theories of abstention, both of which are applicable in this case. "Pullman Abstention," premised upon the Supreme Court case of *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), and "Younger Abstention," premised upon the Supreme Court case of *Younger v. Harris*, 401 U.S. 37 (1971).[2]

1. *Pullman* Abstention Doctrine

In the *Pullman* case, the Supreme Court held that abstention by a federal court may be proper in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication. *Pullman, supra*, 312 U.S. at 498. More recently, this circuit in *Pearl Investment Company v. City and County of San Francisco*, 774 F.2d 1460 (9th Cir. 1985), elaborated on certain considerations for abstention.

In the *Pearl Investment* case, plaintiff brought an action under 42 U.S.C. §1983 alleging violation of its Fifth and Fourteenth Amendment rights based upon the city's planning commission's actions on a building application that the plaintiff contended imposed certain restrictive conditions on the project. Before filing an action in federal court, plaintiff had unsuccessfully petitioned in state court for a writ of mandate to compel the City to automatically approve its building application. The district court stayed the federal action pending state court adjudication of the state law issues. On appeal, the Ninth Circuit affirmed the district court's decision to abstain, applying the so-called "three-part *Pullman* abstention test," which considers whether (1) the complaint "touches a sensitive area of social policy" upon which the courts ought not to enter unless no alternative to its adjudication is open; (2) such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy; and (3) the determinative issue of state law is doubtful. *Id.* at 1463. These three factors likewise are present in this case and should cause this Court to abstain from exercising further jurisdiction.

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[2] It bears worth recalling that at the conclusion of the hearing on Blackwater's *ex parte* application for a TRO, the City requested that a hearing be scheduled on a 12(b)(6) motion to dismiss based on abstention grounds. (5/30/08 Transcript, Doc. 15, p. 49: 11-13). The Court declined this request and reminded the parties that such a motion would have to be scheduled in compliance with the local 28-day hearing scheduling requirements. (Doc. 15, p. 50: 22-23). At the preliminary injunction hearing, the Court inquired whether the City would be making any arguments regarding abstention at that hearing. (6/17/08 Transcript, Doc. 35, p. 39: 25 to p. 40: 1). The City Attorney advised that the City would defer making an abstention argument. (Doc. 35, p. 40: 8-9). Consistent with this Court's scheduling directive pronounced at the TRO and preliminary injunction hearings, the City Defendants now more fully assert the legal grounds to request that this Court abstain from the further exercise of jurisdiction in this case in accordance with the *Younger* and/or *Pullman* abstention doctrines.

First, two of Blackwater's claims are based directly on novel theories alleging violation of the California Constitution which is involves extremely sensitive issues of state policy. Whether a permit applicant can directly sue for violation of the California Constitution is purely a matter of state law which touches upon sensitive issues of state policy. A particularly good case for "Pullman Abstention" exists when there is no reason to assume that the California Supreme Court will construe the California Constitution in the same way that federal courts construe the United States Constitution. *Smelt v. County of Orange*, 447 F.3d 673, 681-682 (9th Cir. 2006) (*citing*, *Columbia Basin Apartment Ass'n v. City of Pasco*, 268 F.3d 791, 806 (9th Cir. 2001)).

All of Blackwater's claims—federal and state—stem from a dispute whether Blackwater's use of the Building for military training operations, including simulated terrorism attacks and defensive responses, is authorized by the OMDD Ordinance. As recognized in the *Pearl Investment* case, land-use planning questions "touch a sensitive area of social policy" into which federal courts should not lightly intrude. *Pearl Investment*, *supra*, 774 F.2d at 1463. *Also see*, *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 409 (9th Cir. 1996). Blackwater's proposed use of conducting simulated military anti-terrorism operations in an area zoned for industrial uses is precisely the delicate land-use planning question that this Court should not lightly intrude.

Second, state law issues raised by Blackwater's applications for permits may determine or narrow the federal constitutional questions found in its complaint. If the City were to abuse its discretion in acting on the permit applications, Blackwater could take advantage of the California administrative mandamus procedure found at California Civil Code § 1094.5. In the *Pearl Investment* case, the Ninth Circuit concluded that the state law issues in that case might determine or narrow the federal questions of whether plaintiff's rights to due process and equal protection had been denied. *Pearl Investment*, *supra*, 774 F.2d at 1464. The *Pearl Investment* Court also found that the administrative mandamus procedure satisfied the second criterion for Pullman abstention. *Id.* (*citing*, *C-Y Development Co v. City of Redlands,* 703 F.2d 375, 379 (9th Cir. 1983)). After Blackwater exhausts the City's administrative permitting process, it too can take advantage of the administrative mandamus procedure if it believes that the City erred in its review of the permit applications.

Third, the *Pearl Investment* Court recognized that resolution of an issue of state law may be uncertain because a statute is ambiguous or because the question is novel and of sufficient importance that it ought to be addressed first by a state court. *Id.* at 1465. An issue of first impression presented by Blackwater's permit applications is whether the training of military personnel to respond to simulated terrorist attacks is an authorized land use that falls within the definition of "vocational training" in accordance with the OMDD Ordinance. The ultimate objective of the City's land use laws is the protection of the public health, safety and welfare. *See*, San Diego Municipal Code Section ("SDMC §") 111.0102. The City should be given an opportunity to make a final decision on this issue based on the totality of circumstances and, if appropriate, set conditions on Blackwater's permits in order to protect the health and safety of its citizens. As the *Pearl Investment* Court stated: "[w]hether a city has abused its discretion by refusing to issue a building permit is by nature a question turning on the peculiar facts of each case in light of the many local and statewide land use laws and regulations applicable to the area in question. We do not claim the ability to predict whether a state court would decide that the city abused its discretion." *Id.*

Because all three criteria for abstaining on *Pullman* abstention grounds are present, this Court should abstain from exercising further jurisdiction in this case. Alternatively, this Court should stay proceedings while the City further reviews Blackwater's permit applications and Blackwater is afforded the opportunity to file a petition for a writ of mandate in state court.

2. ***Younger* Abstention Doctrine**

The *Younger* Court held that the doctrine of abstention requires that a federal court not interfere with an ongoing state judicial proceeding that implicates important state interests where there is an adequate opportunity to raise federal claims in the state proceeding. *Younger*, *supra*, 401 U.S. at 55. Abstention by a district court is required under *Younger* when three criteria are satisfied: (1) state judicial proceedings are ongoing; (2) the proceedings implicate important state interests; and (3) the state proceedings provide an adequate opportunity to raise federal questions." *Kay v. City of Rancho Palos Verdes*, 504 F.3d 803, 808 (9th Cir. 2007); *Commc'ns Telesys. Int'l v. Cal. Pub. Util. Comm'n*, 196 F.3d 1011, 1015 (9th Cir. 1999).

When *Younger* is applicable, dismissal of the action is required. Although the *Younger* case involved a state criminal case, its policies are fully applicable to civil proceedings when important state interests are involved. *Equity Lifestyle Properties, Inc. v. County of San Luis Obispo*, 505 F.3d 860, 873 n.20 (9th Cir. 2007). The goal of Younger abstention is to "avoid interference with uniquely state interests." *AmerisourceBergen Corporation v. Roden*, 495 F.3d 1143, 1150 (9th Cir. 2007). Additionally, the policies behind the *Younger* abstention doctrine must be implicated by the relief requested of the federal court. *AmerisourceBergen*, *supra*, 495 F.3d at 1149. Thus, a federal court should abstain if the court's action would enjoin or have the practical effect of enjoining ongoing state proceedings, which include pending administrative proceedings. *Id.* (*citing*, *Gilbertson v. Albright*, 381 F.3d 965, 978 (9th Cir. 2004) (*en banc*)); *Baffert v. California Horse Racing Bd.*, 332 F.3d 613, 618 (9th Cir. 2003).

This Court preliminary enjoined the City from: (1) refusing to allow Blackwater to occupy and use the Otay Mesa facility consistent with the building permits the City already granted and (2) revoking Blackwater's certificates of occupancy and/or subjecting Blackwater's ministerial permit applications to additional "discretionary" review, absent further order of the Court. This Court also ordered the City to promptly and properly process any currently pending ministerial permits for the Otay Mesa property. (Doc. 32, p. 17).

Blackwater's application for a permit to use a simulator at the Otay Mesa facility for amusement purposes was filed on May 28, 2008, which was after Blackwater filed the instant lawsuit and sought injunctive relief. (Docs. 1, 4.) Although the simulator application was not the subject of the Blackwater's TRO and preliminary injunction applications, the Defendants have nevertheless promptly and properly processed Blackwater's initial permit application for its simulator. City staff who reviewed the simulator permit application recently asked Blackwater to respond to staff comments before any decision is made to issue the permit. See, Declaration of Afsaneh Ahmadi Declaration in support of Defendants' Joint Motion to Dismiss, ¶¶4-7, filed and served concurrently herewith. It is these ongoing administrative proceedings, including the prospect that Blackwater may apply for even more permits associated with its Otay Mesa facility, that support *Younger* abstention in this case.

This Court recognized that a permit remained pending at the time of her order, and notwithstanding directed the City not to undertake "any additional discretionary review, absent further order of the Court." (Doc. 33, 2:11-12.) Such ongoing administrative proceedings, as well as the prospect that Blackwater may apply for even more permits associated with its Otay Mesa facility, fully support *Younger* abstention in this case. Such proceedings implicate important state or local interests because they implicate the interest of the City in ensuring that its land use laws are consistently and fairly applied.

The importance of the interest is to be measured in considering its significance broadly, rather than by focusing on the City's interest in the resolution of a particular case. *Baffert*, *supra*, 332 F.3d at 618 (*citing*, *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 365 (1989). Indeed, this Court acknowledged at the show cause hearing, "that traditionally land use issues are deferred to the local governments or state governments for land use planning." (Doc. 35, 7: 22-24.) *Also see*, *Rodrigues v. County of Hawaii*, 823 F.Supp. 798, 801 (D. Haw. 1993) (county's action in denying building permit application and enforcing setback requirements implicate important state interests requiring *Younger* abstention in a §1983 action).

The City's administrative review process adequately affords Blackwater an opportunity to raise federal questions because after the process is administratively exhausted, a project applicant is afforded the opportunity to raise federal questions in State Court by way of the administrative mandamus procedure if a City official improperly denies an permit application. The further exercise of jurisdiction by this Court would have the practical effect of enjoining the City's administrative proceedings from going forward with meaningful discretionary review.

For all of these reasons, the requirements for *Younger* abstention have been met in this case. There is no support for the legal theory advocated by Blackwater that because Blackwater is allegedly controversial or unpopular among certain segments of the community, its permit applications should not be subject to the same level of scrutiny as any other project applicants. This Court should abstain from this case in recognition of the fact that Blackwater, like any other project applicant, is not above the City's land use laws, and like its neighbors, its project is subject to meaningful review for compliance with the law. Basic principles of comity lead to the conclusion that Blackwater should at least exhaust the City's administrative permitting process before bringing a suit for the alleged violation of its state and federal constitutional rights.

E. PLAINTIFF'S FIRST AND SECOND CLAIMS FOR RELIEF AGAINST THE CITY DEFENDANTS MUST BE DISMISSED FOR FAILURE TO STATE A CLAIM FOR WHICH RELIEF MAY BE GRANTED

Plaintiff's First Claim for Relief seeking injunctive relief to obtain Certificates of Occupancy for the Building and enjoining the City and its officials from refusing to issue them for any reason (Doc. 1, 18:12-28), and its Second Claim for Declaratory (Doc. 1, 19:12-15) are premature at best. It is well settled that "injunctive and declaratory judgment remedies are discretionary and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution." *Abbott Laboratories v. Gardner*, *supra*, 387 U.S. at 148. Again, the basic purpose of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Id.* at 148-49.

Thus, in evaluating ripeness, courts assess "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149; *Association of American Med. Colleges*, *supra*, 217 F.3d at 780. Accordingly, even if federal question jurisdiction may be established by pleading a substantial federal constitutional or statutory claim, or for declaratory relief, Plaintiff's claims must still be ripe for review before this Court should exercise jurisdiction. *Assoc. of Am. Medical Colleges*, *supra*, 217 F.3d at 784.

As discussed above, under *Younger* abstention, federal courts may not grant declaratory or injunctive relief that would interfere with state civil proceedings, including state administrative proceedings that are judicial in nature. *Delta Dental Plan v. Mendoza,* 139 F.3d 1289, 1293-94 (9th Cir. 1998). Absent extraordinary circumstances, *Younger* abstention is required if the state proceedings are (1) ongoing, (2) implicate important state interests, and (3) provide the plaintiff an adequate opportunity to litigate federal claims. *Hirsh v. Justices of the Supreme Court*, 67 F. 3d. 708, 712 (9th Cir. 1995). Unlike *Pullman* abstention, *Younger* abstention requires dismissal of the federal claim for injunctive relief. *Delta Dental Plan*, *supra*, 139 F. 3d 1289, 1293-94.

1. The City Land Use Approvals Have Not Yet Been Completed.

On May 19, 2008, Broughton, as the City's DSD Director, exercised his discretion under SDMC §§ 111.0205, 131.0110(a) and 1517.0301(c)(2) to require Blackwater's use of the Building as a military training center to undergo further land use review, stating the following: "As the majority of the structure is still identified for warehouse uses, no other uses are permitted until a submission for a request of change in occupancy has been made and approved by the Development Services Department." (Doc. 4-2, pp. 45-50.) It is without dispute that it is within the City's municipal authority to require additional discretionary approvals before a project may proceed. See, SDMC§§ 112.0103, 131.0620(e), 129.0111(d), 131.0110(a), 131.0110(c), 129.0104(a)(10) and 1517.0301(c)(2), 128.0201, 128.0202(c), 128.0207 and 111.0205.

Particularly noteworthy is SDMC § 112.0103, which provides in pertinent part:

> When an applicant applies for more than one *permit* … or other approval for a single development, the applications **shall be consolidated for processing** and shall be reviewed by a single decision maker. The decision maker shall act on the **consolidated** application at the highest level of authority for that development as set forth in Section 111.0105. (Italics in original)(bold emphasis added).[3]

[3] SDMC §111.0105 provides that "[f]or purposes of the Land Development Code, the hierarchy of decision-making authority for acting upon an application for a permit, map, or other matter is as follows in descending order: (a) City Council; (b) Planning Commission; (c) Hearing Officer; and (d) City Staff."

This section triggers entitlements to other procedures. *Parks v. Watson*, 716 F.2d 646, 656 (9th Cir. 1983)(a property interest in a benefit protected by the due process clause results from a legitimate claim of entitlement created and defined by an independent source, such as state law). As such, Plaintiff is entitled to go through processing per the *Parks* case. The City is providing Plaintiff with its process by going through a consolidation of processing as provided by SDMC §112.0103, based on the multiple applications filed related to the property and the varying uses thereon.

The City, according to its Land Development Code, also is entitled to look at the totality of circumstances, that is, a consolidation of processing per SDMC 112.0103. Once the City consolidated its process and made a new determination as to its review, there was no constitutional right to a lower level of review. The issue is a level of discretion. Thus, the matter is not ripe because the City has not completed its consolidated processing. Indeed, Blackwater delayed the processing by bringing legal action, and the district court adjudicated too early. The City could have taken and should have been permitted to take action through its normal processes by now, but for having been deprived of doing so by the court.

Additionally, as expressly stated in SDMC § 121.0308, the issuance of any construction permit does not grant a person a right to violate other laws:

> (a) The issuance or granting of [a]...*construction permit* ... does not constitute a permit for, or an approval of, any violation of any of the provisions of the Land Development Code, including the Building, Electrical, Plumbing, or Mechanical Regulations or any other ordinance of the City. *Development permits*, *construction permits*, or inspections presuming to give authority to violate or cancel the provisions of the Land Development Code, Building, Electrical, Plumbing, or Mechanical Regulations or other ordinances of the City ***are not valid***. [¶] (b) The issuance of a ... *construction permit* based on plans, specifications, and other data ***does not prevent*** the City Manager from subsequently requiring the correction of errors in the plans, specifications, and other data or ***the Building Official from stopping building operations*** that are in violation of the Land Development Code or any other applicable law.

SDMC §121.0308(a), (b) (emphasis added).

The City's Building Official oversees the issuance of building and construction permits for the City and is charged with interpreting the City's Land Development Code. SDMC

§129.0104(a)(4). Further, the Building Official may only approve and issue construction permits (such as the "building permits" at issue herein) that comply with the City's Land Development Code provisions. SDMC §129.0104(a)(3). When the Building Official determines that a building does not comply with provisions of the SDMC, she has no obligation to issue the permit, notwithstanding the fact that the general application made for the permit was initially thought to be merely "ministerial." SDMC 129.0111(d). The City's Land Development Code authorizes the reclassification of a project or further review. *See*, SDMC §§ 112.0103, 131.0620(e), 129.0111(d), 131.0110(a), 131.0110(c), 129.0104(a)(10), 1517.0301(c)(2), 128.0201, 128.0202(c), 128.0207 and 111.0201.

Blackwater admitted that it knew as early as February 2008 that it would be conducting training within the City pursuant to a contract with the Navy. (Doc. 26-3, 11.) It was Blackwater that chose to process its request for a change of use within the City's OMDD without adequately disclosing the full nature of its intended use of the Building to the City's DSD. In fact, the Court in its ruling on Plaintiff's TRO noted the curious, piecemeal fashion in which Blackwater presented its proposed "change of use" for the Building to the City:

> "Plaintiff's application for a TRO focuses ***only on*** Plaintiff's ability to use the 'portions of the building identified for use as a shooting range and vocational/trade school," which was the subject of the May 19, 2008, letter from the director of the City's Developmental Services Department…." The Court duly notes that subsequent to the commencement of this action, Plaintiff filed a permit application relating to a ***partial replica of a ship bulkhead necessary for the training Plaintiff seeks to provide to Navy sailors….that permit application…remains pending.***"

(Doc. 16, 7:n 2:23-27.) (Emphasis added)

Interestingly, the Blackwater building permit application for the Ship Bulkhead (another piecemeal ministerial permit request) classified the military training hardware as an amusement park "simulator/ride" within the Building, not a full-scale ship replica for military training purposes. (Ahmadi Decl, Doc. 7-3, ¶5; DeGuzman Dec., Doc. 7-5, Exh E.) Since this permit, and the re-evaluation of the Building for military training purposes remains ongoing and incomplete, the City Defendants respectfully submit Blackwater's claims are not ripe and, therefore, should be dismissed.

F. PLAINTIFF'S THIRD AND FOURTH CLAIMS FOR RELIEF AGAINST THE CITY DEFENDANTS MUST BE DISMISSED FOR FAILURE TO STATE A CLAIM FOR WHICH RELIEF MAY BE GRANTED

Blackwater's Third and Fourth Claims for Relief respectively allege the City Defendants violated Blackwater's federally protected procedural due process and equal protection rights under color of state law by the City's exercise of its legitimate right to exercise land use authority over Blackwater's change of use proposal for the Building, thereby delaying the issuance of an occupancy permit for this purpose. (Doc. 1, 20:25-28; 22:9-12). Again, the City Defendants respectfully contend Plaintiff's claims are not ripe and, therefore, must be dismissed.

1. Blackwater's Procedural Due Process Claim Is Without Merit.

Any action for damages under 42 U.S.C. §1983 is premature until the plaintiff has (1) obtained a final determination from the administrative agency charged with enforcing the regulation, and has (2) exhausted his state-provided remedies. *Williamson*, *supra*, 473 U.S. at 186-187, 194-197. While the policies underlying these two concepts often overlap, the finality requirement is concerned with whether the initial decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate. *Id.* at 193. *Also see*, *Long Beach Equities, Inc. v. County of Ventura* (1991) 231 Cal.App.3d 1016, 1041 (allegations of deprivation of due process and equal protection pursuant to title 42 U.S.C. sections 1983 and 1988 not ripe because there were no final decisions).

It is well settled that the essence of procedural due process is notice and a meaningful opportunity to respond. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985). A threshold requirement to a procedural due process claim, however, is the plaintiff's showing of a liberty or property interest protected by the United States Constitution. *Wedges/Ledges of Cal. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994) (*citing*, *Bd. of Regents v. Roth*, 408 U.S. 564, 569 (1972)). To have a property interest, a person clearly must have more than an abstract need or desire. *Nunez v. City of L.A.*, 147 F.3d 867, 872 (9th Cir. 1998). A mere "unilateral expectation" of a benefit or privilege is insufficient. *Id.* Instead, the plaintiff must have a legitimate claim of entitlement to it. *Id. Also see, Roth, supra*, 408 U.S. at 577; *Doran v. Houle*, 721 F.2d 1182, 1186 (9th Cir. 1983) (mere fact a person has received a government benefit in the past, even for a considerable length of time, does not, without more, rise to a legitimate claim of entitlement).

Protected property interests are not created by the Constitution, but by "existing rules or understandings that stem from an independent source such as state law-rules that secure certain benefits and that support claims of entitlement to those benefits." *Thornton v. City of St. Helens*, 425 F.3d 1158, 1164 (9th Cir. 2005)(*citing*, *Roth*, 408 U.S. at 577). A reasonable expectation of entitlement is determined largely by the language of the statute and the extent to which the entitlement is couched in mandatory terms. *Wedges/Ledges of Cal., supra*, 24 F.3d at 62. *Also see, Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760 (2005) (property interests arise only when the relevant state law provisions truly make the conferral of the benefit mandatory).

Accordingly, before Plaintiff may assert it has a viable "property interest" worthy of due process protection, the court must: (1) identify the property interest of which Blackwater asserts it was deprived; (2) determine what specific law, ordinance, or other understanding upon which such interest is created by and/or based; and (3) determine whether under California law, such a "property interest" has really be affected. The City Defendants assert that because the City's land review process has ***not yet been completed***, Plaintiff ***does not yet have a property interest worthy of protection***, despite all of Plaintiff's protests to the contrary.

The City, as a local governmental agency, should first be permitted the full authority to exercise its police power to adequately review and regulate land use within the City to protect the public health, safety and welfare of its residents. *Berman v. Parker,* 348 U.S. 26, 32-33 (1954). A land use regulation lies within the police power of the local governmental agency if it is reasonably related to the public welfare. *Associated Home Builders, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 600-601. This police power is set forth in the California Constitution, which unambiguously confers on all cities within the State the power to "make and enforce within [their] limits all local police, sanitary and other ordinances and regulations not in conflict with general laws." Cal. Const. Art. XI, § 7. ***This has not yet occurred in this case.***

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The use of the Building is governed by the City's planned district laws, and more specifically, the OMDD Ordinance. SDMC §§1517.0101 *et. seq.* The purpose of the OMDD Ordinance is "to create and promote the development of the City's largest and most significant industrial area of the City, and to control the use and development of the City's center near the U.S./Mexican border crossing for manufacturing, wholesaling, distribution, assembly operations, and related support services." SDMC§ 1517.0101. Under the OMDD, a building permit for conversion or alteration of an exiting industrial warehouse building cannot be issued until an application has been submitted stating the ***actual intended change of use for the entire facility***. SDMC§1517.0201(a)(2).

No where in the SDMC, or even in the OMDD, is there a provision that allows an applicant to make piecemeal applications for portions of a building and, as did Blackwater, thereby able to avoid a full and complete evaluation of the new use of a building as is within the City's land use regulatory authority. A project may only be approved by a "Process One" (ministerial approval process), where the entirety of the project is in complete compliance with the sub district use designation assigned to the property by the OMDD. SDMC §1517.0202(a). This means the project must comply with §1517.0204 (Financing of Public Facilities), §1517.0301(Permitted Uses), and §1517.0305 (Property Development Regulations). SDMC §1517.0202(a)(2). None of these requirements have been adequately evaluated by the City yet, given the ***actual intended use of the building*** as a military training center. Again, the significance of SDMC §112.0103 consolidation described above is triggered based on the multiple applications filed related to the Building and the varying uses thereon.

Blackwater has asserted, and the Court thus far has accepted as correct, that "no permit is needed to operate a vocational/trade school" within the OMDD "since such uses are permitted as a matter of right." (TRO Order, Doc. 16, 7:17-18.) However, this is not a correct interpretation of the applicable provisions of the OMDD. Permitted uses within the OMDD Industrial Sub-district where the Building is located includes all of the industrial uses set forth in SDMC §1517.0301, as well as permitted uses in the City IH-2-1 zone. *See*, SDMC §131.0615, Table 131-06A. The IH-2-1 zone does, in fact, include a brief reference to "vocational/trade" school. SDMC§131.0622,

Table 131-06B. However, a "trade school" as defined by the OMDD means a school "instructing in subjects related to a use permitted within the [industrial] sub district." SDMC §1517.0301(a)(8)(A).

It is apparent that Plaintiff claims a "property interest" that has not yet proven nor foreclosed. The City through its police powers has a right to first evaluate a change of use for the industrial warehouse. The change of use to a military training facility, represents a change in use for which the City's municipal laws require discretionary review. Even if the discretionary review is not favorable to Blackwater, under the SDMC, Blackwater is vested with the right of appeal. The City Defendants respectfully contend, the City procedures allow Blackwater a meaningful opportunity to be heard. That being the case, there can be no procedural due process violation, and Blackwater's federal claim on this ground fails. For this reason, Blackwater's federal procedural due process claim should be dismissed.

2. **Plaintiff's Equal Protection Claim Also Is Without Merit.**

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). A plaintiff can state an equal protection claim in one of two ways. One way is to allege that "defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class." *See, e.g., Barren v. Harrington*, 152 F.3d 1193, 1194-95 (9th Cir.1998) (*citing*, *Washington v. Davis*, 426 U.S. 229, 239-40 (1976)). If the acts in question do not involve a suspect classification, a plaintiff can alternatively establish an equal protection claim by alleging that it "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *See, e.g., Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 944 (9th Cir.2004).

Since Blackwater would not be considered part of a protected class, to succeed on an equal protection claim, it must demonstrate the City's treatment of its alleged "property right" (the alleged right to have occupancy permits issued for the Building) is different is substance and kind than he City's treatment of other property owners similarly situated. Stated differently, the City's actions must be irrational and wholly arbitrary. *See*, *Gamble v. City of Escondido*, 104 F.3d 300, 307 (9th Cir. 1997) (rational basis scrutiny also is appropriate for the plaintiff's due process claim, *citing*, *Munoz v. Sullivan*, 930 F.2d 1400, 1404 n.10 (9th Cir. 1991)); *Lockary v. Kayfetz*, 917 F.2d 1150, 1155-56 (9th Cir. 1990) (scrutiny under equal protection analysis is essentially equivalent to scrutiny under due process doctrine the rational relation test will not sustain conduct by state officials that is malicious, irrational or plainly arbitrary).

Blackwater's federal equal protection claim is premised upon alleged disparate treatment between it and Southwestern College, the latter of which purportedly operates a P.O.S.T.-certified police academy in the Otay Mesa area. (Complaint, Doc. 1, ¶¶74-75.) However, the Court may take judicial notice that Southwestern College is part of the state of California Community College System. *See*, Request for Judicial Notice in Support of Defendants' Joint Motion to Dismiss, filed and served concurrently herewith. As such, it is an agency of the State of California and not subject to local land use regulation. *Regents of University of California v. City of Santa Monica* (1978) 77 Cal.App.3d 130, 136 (California Constitution art. XI, §7 does not authorize municipalities to apply local zoning restrictions to state agencies). Accordingly, there is no legal or factual basis to support Blackwater's allegations.

Additionally, Blackwater claims "upon information and belief" that "the City did not require other vocational institutions, including privately-run institutions, to obtain special approval … to operate as a vocational institution, such as the process being imposed on Blackwater." (Complaint, Doc.1, ¶75.) However, the equal protection clause does not preclude the City from treating applying entities differently. Rather is must only have a rational basis for doing so. *See, e.g.*, *Heller v. Doe*, 509 U.S. 312, 319-20 (1993); *California Rifle & Pistol Assn. v. City of West Hollywood* (1998) 66 Cal.App.4th 1302, 1327 (equal protection is not denied simply because an ordinance treats one class of persons differently from another -- where there is no suspect classification, and purely economic interests are involved, a municipality may impose any distinction which bears some 'rational relationship' to a legitimate public purpose).

/ / /

Blackwater by its own admission is a unique business entity, providing specialized vocational training for members of the military, and in particular the United States Navy, which over the past five years includes "training programs for sailors [that] will teach a variety of skills, including marksmanship, assembly and disassembly of firearms, basic arrest and apprehension techniques, and proper safety for the latest state-of-the-art personal weaponry." (Doc.1, ¶22.)

The Court also can take judicial notice that the City precludes the firing of firearms within city limits. SDMC §53.10 (providing that the firing of firearms and other explosives within the city limits be strictly regulated for the protection of all persons and property located in the City). (Doc. 5, 2-3.) This clearly includes the ability to regulate any manner of firearm use within city limits, unless such regulation is beyond the scope of the City's or any municipality's authority to regulate, for example when preemption applies. *See, e.g., Fiscal v. City and County of San Francisco* (2008) 158 Cal.App.4th 895, 919 (the goal of any local authority wishing to legislate in the area of gun control should be to accommodate the local interest with the least possible interference with state law; however, while courts have tolerated subtle local encroachment into the field of firearms regulation, laws which significantly intrude upon the state prerogative have been uniformly struck down as preempted).

Certainly, a local land use review of the use of firearms for military training in the OMDD industrial sub-district does not automatically raise an equal protection issue for which relief must be granted absent more. Blackwater has alleged no facts that reflect that it has ***actually been treated differently*** from another entity engaged in similar types of activities. Indeed, the fact that the City has been deprived of the opportunity to inquire into such activities speaks volumes that no different treatment has occurred. The City's interest in reviewing Blackwater's use of the Building as a military training center, rather than an industrial warehouse, is rationally related to a legitimate governmental interest and does not mean the City would not require ***any prospective vocational school applicant*** to undertake the same steps now imposed on Blackwater to ensure public safety or to determine whether the use of the Building as a military training center is appropriate in the OMDD. Accordingly, Blackwater's equal protection challenge should be dismissed as it is fabricated and completely without legal merit.

G. PLAINTIFF'S FIFTH CLAIM FOR RELIEF FAILS TO STATE A CLAIM FOR VIOLATION OF THE DORMANT COMMERCE CLAUSE

The dormant Commerce Clause protects against state regulations that "erect barriers against interstate trade." *American Booksellers Foundation v. Dean*, 342 F.3d 96, 102 (2d Cir. 2003) (*quoting*, *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 35 (1980). Where the Commerce Clause does apply, the level of scrutiny depends on whether the ordinance in question "discriminates" against interstate commerce. Laws that discriminate against interstate commerce face a virtually *per se* rule of invalidity. *Granholm v. Heald*, 544 U.S. 460, 476 (2005). Because of this rule, discriminatory statutes should be subjected to strict scrutiny and should be upheld "only if the government can demonstrate both that the law serves a legitimate local purpose and that this purpose could not be served as well by available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

Discrimination in this context simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. *Oregon Waste Sys., Inc. v. Or. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994). By contrast, laws that do not discriminate against interstate commerce face a more deferential standard, such as the so-called "Pike test," which holds that "nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" *Id.* (*quoting*, *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). Blackwater claims it is being treated differently as an "out of state" entity and therefore, its rights under the Equal Protection and dormant Commerce Clause have been violated.

However, Blackwater has not been treated differently simply because the changed use of the Building has come under legitimate local land use scrutiny. There is simply no basis to claim the City's OMDD land use regulations discriminate against out-of state entities, or that Blackwater is being singled out for disparate treatment. Blackwater's Dormant Commerce Clause allegations simply mirror those employed for purposes of its federal equal protection claim. (Complaint, Doc.1, ¶¶84-85.) In addition, Blackwater claims that the City has imposed "regulatory measures in a manner designed to benefit in-state economic interests by burdening out-of-state competitors." (Doc. 1, ¶87.) Blackwater has not alleged any facts that remotely suggest that any of the City's actions have been the result of Blackwater's foreign status.

Indeed, all applications submitted to the City were done by local entities. Southwest Law Enforcement Training Enterprises alleged to be a San Diego based company applied for two of the permits. (Doc.1, ¶¶26-27.) Raven Development Group, although an affiliate of Blackwater, continued to process applications describing the facility as the Southwest Law Enforcement facility. (Prel. Inj. Order, Doc. 32, 3:21-28.) Accordingly, Blackwater's claim for relief for violation of the Dormant Commerce Clause should be dismissed in its entirety.

H. THE CITY DEFENDANTS HAVE NOT VIOLATED BLACKWATER'S RIGHTS UNDER THE CALIFORNIA CONSTITUTION

1. The City Did Not Violate Blackwater's Procedural Due Process Rights

The California Supreme Court and the United States Supreme Court apply largely the same analysis and have repeatedly recognized that due process is a flexible concept. *See e.g.*, *Civil Service Assn. v. City and County of San Francisco* (1978) 22 Cal.3d 552, 561; *Gilbert v. Homar*, 520 U.S. 924, 930 (1997); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The essence of procedural due process is notice and an opportunity to respond. *Cleveland Bd. of Educ.*, *supra*, 470 U.S. at 546. The United States Supreme Court also has held numerous times that where a State must act quickly, or where it would be impractical to provide pre-deprivation process, post-deprivation process satisfies the requirements of the Due Process Clause. *See, e.g.*, *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993); *Zinermon v. Burch*, 494 U.S. 113, 128 (1990) (collecting cases); *Barry v. Barchi*, 443 U.S. 55, 64-65 (1979); *Dixon v. Love*, 431 U.S. 105, 115 (1977).

As the California Supreme Court stated in *People v. Ramirez* (1979) 25 Cal.3d 260:

> [T]he extent to which due process [protections] will be available depends on a careful and clearly articulated balancing of the interests at stake in each context. In some instances this balancing may counsel formal hearing procedures that include the rights of confrontation and cross-examination, as well as a limited right to an attorney.... In others, due process may require only that the administrative agency comply with the statutory limitations on its authority. ... More specifically, identification of the dictates of due process generally requires consideration of (1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of

> such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, (3) the dignitary interest in informing individuals of the nature, grounds and consequences of the action and in enabling them to present their side of the story before a responsible governmental official, and (4) the governmental interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at p. 269. *Also see*, *In re Malinda S.* (1990) 51 Cal.3d 368, 383; *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Mohilef v. Janovici* (1996) 51 Cal.App.4th 267, 286-287.

Again, SDMC §112.0301 regarding consolidation of permit processing is instructive. Blackwater actually has been subject to such process no different than any other applicant. In fact, Blackwater has used a strong-arm tactic to get different treatment and also preventing the City from availing itself of this statutory process.

Thus, for the same reasons argued above against Blackwater's federal procedural due process claim, the City has not violated Blackwater's procedural due process rights under the California Constitution.

2. ***The City Did Not Violate Blackwater's Equal Protection Rights***

The California Supreme Court, like the United States Supreme Court, applies the same analysis for equal protection purposes. As explained in *Warden v. State Bar* (1999) 21 Cal.4th 628, there are two principal standards or tests that generally have been applied by the courts of this state and the U.S. Supreme Court in reviewing classifications that are challenged under the equal protection clause of the Fourteenth Amendment of the United States Constitution or article I, section 7, of the California Constitution: the rational basis standard applied for reviewing economic and social welfare legislation in which there is a "discrimination" or differentiation of treatment between classes or individuals, and a strict scrutiny standard applied in cases involving "suspect classifications" or touching on "fundamental interests." *Id.* at 640-641. In the former, distinctions drawn by a challenged statute must only bear some rational relationship to a conceivable legitimate state purpose. *Id.* Under the strict standard applied in such cases, the state bears the burden of establishing not only that it has a compelling interest which justifies the law but that the distinctions drawn by the law are necessary to further its purpose. *Id.*

The City's actions at issue in the present case does not involve suspect classifications or touch upon fundamental interests and thus the applicable standard under which plaintiff's equal protection challenge properly must be evaluated is the rational relationship or rational basis standard. Under the California Constitution, it is well settled that a municipality may divide land into districts and prescribe regulations governing the uses permitted therein, and that zoning ordinances, when reasonable in object and not arbitrary in operation, constitute a justifiable exercise of police power. *Hernandez v. City of Hanford* (2007) 41 Cal.4th 279, 296. *Also see, Associated Home Builders, supra,* 18 Cal.3d at 604-605; Cal. Const., art. XI, § 7; Gov.Code §65800 *et seq*.

Even when the regulation of economic competition reasonably can be viewed as a direct and intended effect of a zoning ordinance or action, so long as the primary purpose of the ordinance or action is not the impermissible private anti-competitive goal of protecting or disadvantaging a particular favored or disfavored business or individual, but instead is the advancement of a legitimate public purpose-such as the preservation of a municipality's downtown business district for the benefit of the municipality as a whole, the ordinance reasonably relates to the general welfare of the municipality and constitutes a legitimate exercise of the municipality's police power. *Hernandez*, *supra*, 41 Cal.4th at 296-297. Moreover, the California equal protection clause does not preclude a governmental entity from adopting a legislative measure that is aimed at achieving multiple objectives, even when such objectives in some respects may be in tension or conflict. *Id.* at 298. *Also see*, *Fitzgerald v. Racing Assn. of Central Iowa*, 539 U.S. 103, 109 (2003) (legislation often is the product of multiple and somewhat inconsistent purposes that led to certain compromises).

In *Hernandez*, the California Supreme Court concluded that an ordinance's differential treatment of large department stores and other retail stores is rationally related to one of the legitimate legislative purposes of the ordinance -- the purpose of attracting and retaining large department stores within a certain district. The *Hernandez* Court noted that the ordinance challenged clearly was intended to serve multiple purposes and also rejected the claim that the city arbitrarily singled them out for discriminatory treatment. Local governments need the flexibility to react to specific proposals for a new kind of development not previously contemplated where such a development will or may have harmful consequences to the locality's legitimate planning objectives. *Hernandez*, *supra*, 41 Cal.4th at 302, n.13.

Blackwater has not stated a cause of action for a violation of equal protection under the California Constitution. As argued above, Southwestern College is not subject to local land use requirements. With respect to other similar and possibly private institutions, Blackwater's allegations are insufficient to plead any disparate actions. Moreover, Blackwater cannot place itself by its own admission in the same category as other general businesses. The California Constitution requires no more than the Federal Constitution – it is not disparate treatment in and of itself that is unconstitutional, but that the City has not acted on a rational basis. *California Rifle & Pistol Assn.*, *supra*, 66 Cal.App.4th at 1327. There are insufficient facts to remotely suggest that the City has not acted on a rational basis given the process. Accordingly, Blackwater's state equal protection claim also should be dismissed.

I. BLACKWATER DID NOT COMPLY WITH FILING REQUIREMENTS OF THE CALIFORNIA GOVERNMENT CLAIMS ACT

As indicated above, this action involves a land use matter that should be left considered and resolved at the local level. To succeed on any claim for money damages against public entity or a public employee in the State of California on the basis of acts or omissions in the scope of their official duties, a party must plead and prove that they have timely filed a claim with the public entity employer pursuant to the California Government Claims Act ("Claims Act"). Failure to allege specific compliance with the requirements of the Claims Act is an affirmative defense for the public entity and its employees and renders any such claim subject to dismissal as a matter of law. *Briggs v. Lawrence* (1991) 230 Cal.App.3d 605.

The Claims Act provides that no suit for money or damages may be maintained against a California public entity unless a formal claim has been presented to, and rejected by the public entity. Cal.Gov. Code §§ 910, 912.4, 912.8, 945.4. If the public entity gives proper notice of rejection, the suit must be commenced within six months after delivery or mailing of the notice of rejection. Cal. Gov. Code §945.6(a)(1). *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 737-738. A breach of contract claim also must be presented to the public entity within one year of accrual of the cause of action. *Id.*; Gov. Code § 911.2. *Also see*, *Westcon Construction Corp. v. County of Sacramento* (2007) 152 Cal.App.4th 183, 190.

Thus, under these statutes, failure to timely present a claim for money or damages to a public entity bars a plaintiff from filing a lawsuit against that entity. *State of California v. Superior Court* (*Bodde*) (2004) 32 Cal.4th 1234, 1239. This applies both to suits against the public entity and to suits against the public employees whose acts are the subject of the claim involved. *Massa v. Southern Cal. Rapid Transit Dist.* (1996) 43 Cal.App.4th 1217, 1222. The timely filing of a claim under the Claims Act is an essential element of a claim for relief against the City and its employees under California law. *Wood v. Riverside General Hospital* (1994) 25 Cal.App.4th 1113.

As a matter of California law, therefore, Blackwater is barred from maintaining any action against the public entity defendants in this matter. *Miller v. United Airlines, Inc.* (1985) 174 Cal.App. 3d 878, 890.

V. CONCLUSION

For all of the foregoing reasons, the City Defendants respectfully submit the entirety of Plaintiff's complaint, and each Claim for Relief therein, should be dismissed for failure to state a viable claim for which relief can be granted.

Respectfully submitted,

Dated: June 23, 2008

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BLACKWATER LODGE AND TRAINING CENTER, INC., a Delaware Corporation dba BLACKWATER WORLDWIDE, Plaintiff, v. KELLY BROUGHTON, in his capacity as Director the Development Services Department of the City of San Diego; THE DEVELOPMENT SERVICES DEPARTMENT OF THE CITY OF SAN DIEGO, an agency of the City of San Diego; AFSANEH AHMADI, in her capacity as the Chief Building Official for the City of San Diego; THE CITY OF SAN DIEGO, a municipal entity; and DOES 1-20, inclusive, Defendants.	Case No. 08 CV 0926 H (WMC) **REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEFENDANTS' JOINT MOTION TO DISMISS PLAINTIFF'S COMPLAINT** Date: July 21, 2008 Time: 10:30 a.m. Courtroom: 13 Judge: Hon. Marilyn L. Huff

/ / /

I. INTRODUCTION

Defendants City of San Diego ("CITY"), the City's Development Services Department ("DSD"), Kelly Broughton ("BROUGHTON") and Afsaneh Ahmadi ("AHMADI") (collectively "City Defendants"), in support of their joint motion to dismiss pursuant to Federal Rules of Civil Procedure ("FRCP") Rule 12(b)(6) in the above-captioned matter, hereby request pursuant to Rule 201 of the Federal Rules of Evidence ("FRE") that the Court to take judicial notice of the items more particularly described below.

II. REQUESTS FOR JUDICIAL NOTICE

A court must take judicial notice if a party requests it and supplies the court with the requisite information. FRE 201(d). "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." FRE 201(b). Furthermore, this Court may take judicial notice of its own records, and documents that are public records and capable of accurate and ready confirmation by sources that cannot reasonably be questioned. *See*, *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir.1986) (courts may take judicial notice of matters of public record outside the pleadings); *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir.1980) (a court may take judicial notice of its own records). Documents whose contents are alleged in a complaint and whose authenticity is not in question may be considered in a motion to dismiss. *See*, *Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir. 1994).

A. Judicial Notice of State Court Community College District

In this category, the City Defendants attach as Exhibit A a web page indicating that Southwestern College, located at 900 Otay Lakes Road, in Chula Vista, California, 91910-7299, is a part of the State of California Community College System. Pursuant to FRE 201, these items are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. The web page address is under the State of California general link and the specific link is as follows:

/ / /

(http://www.cccco.edu/CommunityColleges/CommunityCollegeListings/CollegeListingsRegional/tabid/829/Default.aspx)

The general web page states as follows:

> The California Community Colleges is the largest higher educational system in the nation comprised of 72 districts and 109 colleges with more than 2.5 million students per year. Community colleges supply workforce training and basic skills education, prepare students for transfer to four-year institutions and offer opportunities for personal enrichment and lifelong learning. The System Office provides leadership, advocacy and support under the direction of the Board of Governors of the California Community Colleges.

This information tends to indicate that Southwestern College is a state agency and as such not subject to local land use regulation. *Regents of University of California v. City of Santa Monica* (1978) 77 Cal.App.3d 130, 136 (California Constitution art. XI, §7 does not authorize municipalities to apply local zoning restrictions to state agencies).

Dated: June 23, 2008

MICHAEL J. AGUIRRE, City Attorney

By /S/ Robert J. Walters

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EXHIBIT A

Community Colleges

Community Colleges

Alphabetical, Regional & Dormitory College Listings:

The California Community Colleges is the largest higher educational system in the nation comprised of 72 districts and 109 colleges with more than 2.5 million students per year. Community colleges supply workforce training and basic skills education, prepare students for transfer to four-year institutions and offer opportunities for personal enrichment and lifelong learning. The System Office provides leadership, advocacy and support under the direction of the Board of Governors of the California Community Colleges. If you are considering attending a community college, please contact that college's Admissions Office directly for more information about programs, classes and offerings. For more information on how you can afford college, please visit icanaffordcollege.com

System Map (pdf)

System Grants

Data Mart

College Listings:
Alphabetical
Regional
Dormitories

Approved Programs

Academic Holiday Calendar

Professional Development

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Community Colleges » Community College Listings » College Listings - Regional

Regional Listings

Regional College Listing - Northern

Butte-Glenn Community College District
Butte College
3536 Butte Campus Drive (530) 895-2511
Oroville CA 95965-8399 www.butte.edu

Feather River Community College District
Feather River College
570 Golden Eagle Avenue (530) 283-0202
Quincy CA 95971-9124 www.frc.edu

Lassen Community College District
Lassen College
Highway 139 PO Box 3000 (530) 257-6181
Susanville CA 96130-3000 www.lassencollege.edu

Los Rios Community College District
District Office
1919 Spanos Court Sacramento (916) 568-3021
CA 95825-3981 www.losrios.edu

American River College
4700 College Oak Drive (916) 484-8011
Sacramento CA 95841-4286 www.arc.losrios.edu

Cosumnes River College
8401 Center Parkway (916) 691-7344
Sacramento CA 95823-5799 www.crc.losrios.edu

Folsom Lake College
100 Clarksville Road (916) 608-6500
Folsom CA 95630 www.flc.losrios.edu

Sacramento City College
3835 Freeport Boulevard (916) 558-2111
Sacramento CA 95822-1386 www.scc.losrios.edu

Mendocino-Lake Community College District
Mendocino College
1000 Hensley Creek Rd. (707) 468-3000
Ukiah CA 95482-0300 www.mendocino.cc.ca.us

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Napa Valley Community College District
Napa Valley College
2277 Napa Vallejo Highway (707) 253-3000
Napa CA 94558-6236 www.napavalley.edu

Redwoods Community College District

Redwoods, College of the
7351 Tompkins Hill Road (707) 476-4100
Eureka CA 95501-9301 www.redwoods.edu

Shasta-Tehama-Trinity Joint Community College District
Shasta College
11555 Old Oregon Trail
PO Box 496006 (530) 225-4600
Redding CA 96049-6006 www.shastacollege.edu

Sierra Joint Community College District
Sierra College
5000 Rocklin Road (916) 781-0430
Rocklin CA 95677-3397 www.sierracollege.edu

Siskiyou Joint Community College District
Siskiyous, College of the
800 College Avenue (530) 938-4461
Weed CA 96094-2899 www.siskiyous.edu

Solano County Community College District
Solano Community College
4000 Suisun Valley Road (707) 864-7000
Fairfield, CA 94534-3197 www.solano.edu

Sonoma County Community College District
Santa Rosa Junior College
1501 Mendocino Avenue (707) 527-4011
Santa Rosa CA 95401-4395 www.santarosa.edu

Yuba Community College District
Yuba College
2088 North Beale Road (530) 741-6700
Marysville CA 95901-7699 www.yccd.edu

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Regional College Listing - *Central*

Gavilan Community College District
Gavilan College
5055 Santa Teresa Blvd. (408) 847-1400
Gilroy CA 95020-9599 www.gavilan.edu

Hartnell Community College District
Hartnell College
156 Homestead Avenue (831) 755-6700
Salinas CA 93901-1697 www.hartnell.edu

Lake Tahoe Community College District
Lake Tahoe Community College
1 College Drive (530) 541-4660
So. Lake Tahoe CA 96150-4524 www.ltcc.edu

Merced Community College District
Merced College
3600 M Street (209) 384-6000
Merced CA 95348-2898 www.mccd.edu

Monterey Peninsula Community College District
Monterey Peninsula College
980 Fremont Street (831) 646-4000

Monterey CA 93940-4799 www.mpc.edu

San Joaquin Delta Community College District
San Joaquin Delta College
5151 Pacific Avenue (209) 954-5151
Stockton CA 95207-6370 www.deltacollege.edu

Sequoias Community College District
Sequoias, College of the
915 South Mooney Boulevard (559) 730-3700
Visalia CA 93277-2234 www.cos.edu

State Center Community College District
District Office
1525 East Weldon Avenue (559) 226-0720
Fresno CA 93704-6340 www.scccd.com

Fresno City College
1101 E. University Avenue (559) 442-4600
Fresno CA 93741-0001 www.fresnocitycollege.edu

Reedley College
995 N. Reed Avenue (559) 638-5040
Reedley CA 93654-2099 www.reedleycollege.edu

West Hills Community College District
West Hills College
300 Cherry Lane (559) 934-2000
Coalinga CA 93210-1399 www.westhillscollege.edu

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West Kern Community College District
Taft College
29 Emmons Park Drive (661) 763-7700
Taft CA 93268-4217 www.taftcollege.edu

Yosemite Community College District
District Office
2201 Blue Gum Avenue (209) 575-6508
Modesto CA 95352-4065 www.yosemite.edu

Columbia College
11600 Columbia College Drive (209) 588-5100
Sonora CA 95370-8518 www.columbia.yosemite.edu

Modesto Junior College
435 College Avenue (209) 575-6498
Modesto CA 95350-5800 www.mjc.edu

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Regional College Listing - Bay Area

Cabrillo Community College District
Cabrillo College
6500 Soquel Drive (831) 479-6100
Aptos CA 95003-3119 www.cabrillo.edu

Chabot-Las Positas Community College District
District Office
7011 Koll Center Parkway, Suite 200 (925) 485-5206

Pleasanton CA 94566-3129 www.clpccd.cc.ca.us

Chabot College
25555 Hesperian Blvd PO Box 5001 (510) 723-6600
Hayward CA 94545-5001 www.chabotcollege.edu

Las Positas College
3033 Collier Canyon Road (925) 424-1000
Livermore CA 94550-7650 www.laspositascollege.edu

Contra Costa Community College District

District Office
500 Court Street (925) 229-1000
Martinez CA 94553-1278 www.4cd.net

Contra Costa College
2600 Mission Bell Drive (510) 235-7800
San Pablo CA 94806-3195 www.contracosta.edu

Diablo Valley College
321 Golf Club Road (925) 685-1230
Pleasant Hill CA 94523-1544 www.dvc.edu

Los Medanos College
2700 East Leland Road (925) 439-2181
Pittsburg 94565 5197 www.losmedanos.edu

Foothill-DeAnza Community College District

District Office
12345 El Monte Road (650) 949-6100
Los Altos Hills CA 94022-4599 www.fhda.edu

DeAnza College
21250 Stevens Creek Boulevard (408) 864-5678
Cupertino CA 95014-5797 www.deanza.edu

Foothill College
12345 El Monte Road (650) 949-7777
Los Altos Hills CA 94022-4599 www.foothill.edu

Marin Community College District

Marin, College of
835 College Avenue (415) 457-8811
Kentfield CA 94904-2590 www.marin.cc.ca.us

Ohlone Community College District

Ohlone College
43600 Mission Boulevard (510) 659-6000
Fremont CA 94539-0911 www.ohlone.edu

Peralta Community College District

District Office
333 East 8th Street (510) 466-7200
Oakland CA 94606-2889 www.peralta.cc.ca.us

Alameda, College of
555 Atlantic Avenue (510) 522-7221
Alameda, CA 94501 www.peralta.cc.ca.us/coa/coa.htm

Laney College
900 Fallon Street (510) 834-5740
Oakland CA 94607-4893 www.laney.peralta.edu

Merritt College
12500 Campus Drive (510) 981-2800
Oakland CA 94619-3196 www.merritt.edu

Berkeley City College
2050 Center Street (510) 981-2800
Berkeley CA 94704-1205 vistawww.peralta.edu

San Francisco Community College District
San Francisco, City College of
50 Phelan Avenue, E200 (415) 239-3000
San Francisco CA 94112-1898 www.ccsf.edu

San Jose-Evergreen Community College District
District
4750 San Felipe Road (408) 270-6402
San Jose CA 95135-1599 www.sjeccd.org

Evergreen Valley College
3095 Yerba Buena Road (408) 274-7900
San Jose CA 95135-1598 www.evc.edu

San Jose City College
2100 Moorpark Avenue (408) 298-2181
San Jose CA 95128-2799 www.sjcc.edu

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San Mateo County Community College District
District
3401 CSM Drive (650) 574-6550
San Mateo CA 94402-3651 www.smccd.net

Canada College
4200 Farm Hill Boulevard (650) 306-3100
Redwood City CA 94061-1099 www.canadacollege.edu

San Mateo, College of
1700 West Hillsdale Boulevard (650) 574-6161
San Mateo CA 94402-3784 www.collegeofsanmateo.edu

Skyline College
3300 College Drive (650) 738-4100
San Bruno CA 94066-1662 www.skylinecollege.edu

West Valley-Mission Community College District
District Office
14000 Fruitvale Avenue (408) 867-2200
Saratoga CA 95070-5698 www.wvmccd.cc.ca.us

Mission College
3000 Mission College Boulevard (408) 988-2200
Santa Clara CA 95054-1897 www.missioncollege.org

West Valley College
14000 Fruitvale Avenue (408) 867-2200
Saratoga CA 95070-5699 www.westvalley.edu

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Regional College Listing - Southern

Allan Hancock Joint Community College District
Allan Hancock College
800 South College Drive (805) 922-6966
Santa Maria CA 93454-6368 www.hancockcollege.edu

Antelope Valley Community College District
Antelope Valley College
3041 West Avenue K (661) 722-6300
Lancaster CA 93536-5426 www.avc.edu

Barstow Community College District
Barstow College
2700 Barstow Road (760) 252-2411
Barstow CA 92311-6699 www.barstow.edu

Cerritos Community College District
Cerritos College
11110 Alondra Boulevard (562) 860-2451
Norwalk CA 90650-6269 www.cerritos.edu

Chaffey Community College District
Chaffey College
5885 Haven Avenue (909) 987-1737
Rancho Cucamonga CA 91737 www.chaffey.edu

Citrus Community College District
Citrus College
1000 West Foothill Boulevard (626) 963-0323
Glendora CA 91741-1899 www.citruscollege.edu

Coast Community College District
District Office
1370 Adams Avenue (714) 438-4600
Costa Mesa CA 92626-5495 www.cccd.edu

Coastline Community College
11460 Warner Avenue (714) 546-7600
Fountain Valley CA 92708-2597 www.coastline.edu

Golden West College
15744 Goldenwest Street (714) 892-7711
Huntington Beach CA 926470592 www.gwc.cccd.edu

Orange Coast College
2701 Fairview Road PO Box 5005 (714) 432-0202
Costa Mesa CA 92628-5005 www.orangecoastcollege.edu

Copper Mountain Community College District
Copper Mountain College
6162 Rotary Wy (P.O. Box 1398) (760) 366-3791
Joshua Tree, CA 92252 www.cmccd.edu

Desert Community College District
Desert, College of the
43 500 Monterey Avenue (760) 346-8041
Palm Desert CA 92260-2499 www.collegeofthedesert.edu

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El Camino Community College District
El Camino College
16007 Crenshaw Boulevard (310) 532-3670

Torrance CA 90506-0002 www.elcamino.edu

Compton Community Educational Center
1111 East Artesia Boulevard (310) 900-1600
Compton CA 90221-5393 www.compton.edu

Glendale Community College District

Glendale Community College
1500 North Verdugo Road (818) 240-1000
Glendale CA 91208-2894 www.glendale.edu

Grossmont-Cuyamaca Community College District

District Office
8800 Grossmont College Drive (619) 644-7010
El Cajon CA 92020-1799 www.gcccd.net

Cuyamaca College
900 Rancho San Diego Parkway (619) 660-4000
El Cajon CA 92019-4304 www.cuyamaca.edu

Grossmont College
8800 Grossmont College Drive (619) 644-7000
El Cajon CA 92020-1799 www.grossmont.edu

Imperial Community College District

Imperial Valley College
380 East Aten Road (760) 352-8320
Imperial CA 92251-9787 www.imperial.edu

Kern Community College District

District Office
2100 Chester Avenue (661) 336-5100
Bakersfield CA 93301-4099 www.kccd.cc.ca.us

Bakersfield College
1801 Panorama Drive (661) 395-4011
Bakersfield CA 93305-1299 www.bakersfieldcollege.edu

Cerro Coso Community College
3000 College Heights Boulevard (760) 384-6100
Ridgecrest CA 93555-9571 www.cerrocoso.edu

Porterville College
100 East College Avenue (559) 791-2200
Porterville CA 93257-5901 www.portervillecollege.edu

Long Beach Community College District

Long Beach City College
4901 East Carson Street (562) 938-4353
Long Beach CA 90808-1706 www.lbcc.edu

Los Angeles Community College District

District Office
770 Wilshire Boulevard (213) 891-2000
Los Angeles CA 90017-3896 www.laccd.edu

East Los Angeles College
1301 Avenida Cesar Chavez (323) 265-8650
Monterey Park CA 91754-6099 www.elac.edu

Los Angeles City College

855 North Vermont Avenue (323) 953-4000
Los Angeles CA 90029-3590 www.lacitycollege.edu

Los Angeles Harbor College
1111 Figueroa Place (310) 233-4000
Wilmington CA 90744-2397 www.lahc.edu

Los Angeles Mission College
13356 Eldridge Avenue (818) 364-7600
Sylmar CA 91342-3200 www.lamission.edu

Los Angeles Pierce College
6201 Winnetka Avenue (818) 719-6401
Woodland Hills CA 91371-0001 www.piercecollege.edu

Los Angeles Southwest College
1600 West Imperial Highway (323) 241-5225
Los Angeles CA 90047-4899 www.lasc.edu

Los Angeles Trade-Tech College
400 West Washington Boulevard (213) 763-7000
Los Angeles CA 90015-4108 www.lattc.edu

Los Angeles Valley College
5800 Fulton Avenue (818) 947-2600
Van Nuys CA 91401-4096 www.lavc.edu

West Los Angeles College
9000 Overland Avenue (310) 287-4200
Culver City CA 90230 www.wlac.edu

MiraCosta Community College District

MiraCosta College
1 Barnard Drive (760) 757-2121
Oceanside CA 92056-3899 www.miracosta.edu

Mt. San Antonio Community College District

Mt. San Antonio College
1100 North Grand Avenue (909) 594-5611
Walnut CA 91789-1399 www.mtsac.edu

Mt. San Jacinto Community College District

Mt. San Jacinto College
1499 North State Street (951) 487-6752
San Jacinto CA 92583-2399 www.msjc.edu

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North Orange County Community College District

District
1830 W Romneya Drive (714) 808-4500
Anaheim, CA 92801-1819 www.nocccd.edu

Cypress College
9200 Valley View Street (714) 484-7000
Cypress CA 90630-5897 www.cypresscollege.edu

Fullerton College
321 East Chapman Avenue (714) 992-7000
Fullerton CA 92832-2095 www.fullcoll.edu

Palo Verde Community College District

Palo Verde College
One College Drive (760) 921-5500
Blythe CA 92225-1118 www.paloverde.edu

Palomar Community College District
Palomar College
1140 West Mission Road (760) 744-1150
San Marcos CA 92069-1487 www.palomar.edu

Pasadena Area Community College District
Pasadena City College
1570 East Colorado Boulevard (626) 585-7123
Pasadena CA 91106-2003 www.pasadena.edu

Rancho Santiago Community College District
District Office
2323 N. Broadway (714) 564-6000
Santa Ana CA 92706-1640 www.rsccd.org

Santa Ana College
1530 W. 17th Street (714) 564-6000
Santa Ana CA 92706-3398 www.sac.edu

Santiago Canyon College
8045 E. Chapman Avenue (714) 564-4000
Orange, CA 92869-4512 www.sccollege.edu

Rio Hondo Community College District
Rio Hondo College
3600 Workman Mill Road (562) 692-0921
Whittier CA 90601-1699 www.riohondo.edu

Riverside Community College District
Riverside Community College
4800 Magnolia Avenue (951) 222-8000
Riverside CA 92506-1293 www.rcc.edu

San Bernardino Community College District
District Office
441 West 8th Street (909) 884-2533
San Bernardino CA 92401-1070 www.sbccd.cc.ca.us

Crafton Hills College
11711 Sand Canyon Road (909) 794-2161
Yucaipa CA 92399-1799 www.craftonhills.edu

San Bernardino Valley College
701 S. Mt. Vernon Avenue (909) 384-4400
San Bernardino CA 92410-2798 www.valleycollege.edu

San Diego Community College District
District Office
3375 Camino del Rio South (619) 584-6960
San Diego CA 92108-3883 www.sdccd.edu

San Diego City College
1313 12th Avenue (619) 388-3400
San Diego CA 92101-4787 www.sdcity.edu

San Diego Centers for Education and Technology
San Diego Community College District
4343 Ocean View Boulevard (619) 388-4881

San Diego CA 92113-1998 www.sandiegocet.net

San Diego Mesa College
7250 Mesa College Drive (619) 388-2600
San Diego, CA 92111-4998 www.sdmesa.edu

San Diego Miramar College
10440 Black Mountain Road (858) 388-7800
San Diego CA 92126-2999 www.miramarcollege.edu

San Luis Obispo County Community College District
Cuesta College
PO Box 8106 (805) 546-3100
San Luis Obispo CA 93403-8106 www.cuesta.edu

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Santa Barbara Community College District
Santa Barbara City College
721 Cliff Drive (805) 965-0581
Santa Barbara CA 93109-2394 www.sbcc.edu

Santa Clarita Community College District
Canyons, College of the
26455 N. Rockwell Canyon Road (661) 259-7800
Santa Clarita CA 91355-1899 www.canyons.edu

Santa Monica Community College District
Santa Monica College
1900 Pico Boulevard (310) 434-4000
Santa Monica CA 90405-1628 www.smc.edu

South Orange County Community College District
District Office
28000 Marguerite Parkway (949) 582-4999
Mission Viejo CA 92692-3635 www.socccd.edu

Irvine Valley College
5500 Irvine Center Drive (949) 559-9300
Irvine CA 92720-4399 www.ivc.edu

Saddleback College
28000 Marguerite Parkway (949) 582-4500
Mission Viejo CA 92692-3699 www.saddleback.edu

Southwestern Community College District
Southwestern College
900 Otay Lakes Road (619) 421-6700
Chula Vista CA 91910-7299 www.swc.cc.ca.us

Ventura County Community College District
District
255 W. Stanley Avenue #150 (805) 384-8300
Ventura, CA 93001-1346 www.vcccd.net

Moorpark College
7075 Campus Road (805) 378-1400
Moorpark CA 93201-1695 www.moorparkcollege.edu

Oxnard College
4000 South Rose Avenue (805) 986-5800
Oxnard CA 93033-6699 www.oxnardcollege.edu

Ventura College
4667 Telegraph Road (805) 654-6400
Ventura CA 93003-3899 www.venturacollege.edu

Victor Valley Community College District
Victor Valley College
18422 Bear Valley Road (760) 245-4271
Victorville CA 92392-5849 www.vvc.edu

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Article 3: Firearms — Dangerous Weapons — Explosives — Hazardous Trades

("Firearms — Dangerous Weapons — Explosives — Hazardous Trades" incorp. 1–22–1952 by O–5046 N.S.)

§53.01 Blasting — Permit Required

It shall be unlawful for any person or persons, firm or corporation to do any blasting within the corporate limits of the City of San Diego without first having obtained, from the Fire Chief of The City of San Diego, a permit, which is required under California Health and Safety Code, Section 12101. The Fire Chief of The City of San Diego is hereby designated the issuing authority in conformance with California Health and Safety Code, Section 12007.
("Blasting— Permit Required" amended 2–22–1972 by O–10787 N.S.)

§53.01.1 Blasting — Application For License — Insurance Required

Any applicant to the San Diego Fire Department for a permit for the use of explosives within the limits of the City of San Diego for blasting, as provided above, shall, before such permit is issued, have a policy of insurance approved by the City Attorney, executed and delivered by a reliable insurance company authorized to carry on an insurance business in the State of California, by the terms of which said insurance company assumes responsibility for injuries to persons and property resulting by reason of the use of such explosives by applicant in the following amounts; to wit,

Bodily Injury $250,000 — Per person

$500,000 — Per occurrence Property Damage

$250,000 — Per occurrence.
(Amended 2–22–1972 by O–10787 N.S.)

§53.10 Firearms, Etc. — Firing Prohibited — Exceptions

(a) Purpose and Intent. It is the purpose and intent of the Council of The City of San Diego that the firing of firearms and other explosives within the city limits be strictly regulated for the protection of all persons and property located in the City.

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Attorneys for Defendants
KELLY BROUGHTON; THE DEVELOPMENT SERVICES DEPARTMENT OF THE CITY OF SAN DIEGO; AFSANEH AHMADI; THE CITY OF SAN DIEGO

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BLACKWATER LODGE AND TRAINING CENTER, INC., a Delaware Corporation dba BLACKWATER WORLDWIDE, Plaintiff, v. KELLY BROUGHTON, in his capacity as Director the Development Services Department of the City of San Diego; THE DEVELOPMENT SERVICES DEPARTMENT OF THE CITY OF SAN DIEGO, an agency of the City of San Diego; AFSANEH AHMADI, in her capacity as the Chief Building Official for the City of San Diego; THE CITY OF SAN DIEGO, a municipal entity; and DOES 1-20, inclusive, Defendants.	Case No. 08 CV 0926 H (WMC) **DECLARATION OF AFSANEH AHMADI IN SUPPORT OF DEFENDANTS' JOINT MOTION TO DISMISS PLAINTIFF'S COMPLAINT** Date: July 21, 2008 Time: 10:30 a.m. Courtroom: 13 Judge: Hon. Marilyn L. Huff

I, Afsaneh Ahmadi, declare as follows:

1. I am employed as the Chief Building Official for the City of San Diego's Developmental Services Department ("DSD").

2. I make this declaration based upon my own personal knowledge, except as to those matters set forth in this declaration on information and belief, and as to those

matters, I believe them to be true. If called upon to testify as to those matters stated in this declaration, I could and would competently testify to those matters.

3. On information and belief, a true and correct copy of Plaintiff's application to use a simulator is already on file with this Court (project # 157613). It can be found at Exhibit E to the declaration of Julio DeGuzman in response to the Court's order to show cause in this case. (Doc. #21-6).

4. Attached at Exhibit A is a true and correct copy of the first review comments of DSD reviewer Will Kwan for this project. As the review indicates, two issues were initially identified and resolved.

5. Attached at Exhibit B is a true and correct copy of the comments of DSD reviewer David Glanville for this project. Mr. Glanville completed his review of this project on June 3, 2008. As the review indicates, 55 unresolved issues have been identified.

6. Attached at Exhibit C is a true and correct copy of the comments of DSD reviewer Mike Benoit for this project. Mr. Benoit completed his review of this project on June 4, 2008. As the review indicates, 9 unresolved issues have been identified.

7. Under DSD's normal review process, DSD cannot issue a permit for this project until all issues have been resolved with the project applicant. DSD' staff is still waiting for the Plaintiff to respond to the pending 64 issues in question.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on 23rd day of June, 2008 at San Diego, California.

[signature]

Afsaneh Ahmadi

EXHIBIT A

Cycle Issues

THE CITY OF SAN DIEGO
Development Services
1222 First Avenue, San Diego, CA 92101-4154

6/23/08 8:28 am
Page 1 of 1

L64A-003A

Project Information

Project Nbr: 157613 **Title:** Raven Dev Simulator/Ride
Project Mgr: Vega, Jama (619) 687-5935 jvega@sandiego.gov

Review Information

Cycle Type:	9 BDR-Planning (Submit)	**Submitted:**	05/29/2008	Deemed Complete on 05/30/2008
Reviewing Discipline:	BDR-Planning	**Cycle Distributed:**	05/30/2008	
Reviewer:	**Kwan, Will**	**Assigned:**	06/02/2008	
	(619) 446-5326	**Started:**	06/05/2008	
Hours of Review:	2.00	**Review Due:**	06/13/2008	
Next Review Method:	BDR-Planning (Submit)	**Completed:**	06/05/2008	**COMPLETED ON TIME**
		Closed:	06/05/2008	

. Last month BDR-Planning performed 393 reviews, 96.7% were on-time, and .0% were on projects at less than < 3 complete submittals.

1st Review Comments

Cleared?	Issue Num	Issue Text
☒	1	The construction plans as presented conform to the Otay Mesa Development District - Industrial Subdistricts Regulations. (New Issue)
☒	2	Please contact the Planner, Will Kwan at (619) 446-5326 to schedule an appointment for a stamp transfer. (New Issue)

EXHIBIT B

Cycle Issues

THE CITY OF SAN DIEGO
Development Services
1222 First Avenue, San Diego, CA 92101-4154

6/23/08 8:26 am
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L64A-003A

Project Information

Project Nbr: 157613 **Title:** Raven Dev Simulator/Ride
Project Mgr: Vega, Jama (619) 687-5935 jvega@sandiego.gov

Review Information

Cycle Type:	1 BDR-Structural (Submit)	**Submitted:**	05/28/2008	Deemed Complete on 05/28/2008
Reviewing Discipline:	BDR-Structural	**Cycle Distributed:**	05/28/2008	
Reviewer:	**Glanville, David**	**Assigned:**	05/29/2008	
	(619) 687-5957	**Started:**	05/30/2008	
Hours of Review:	4.00	**Review Due:**	06/11/2008	
Next Review Method:	BDR-Structural (Submit)	**Completed:**	06/03/2008	**COMPLETED ON TIME**
		Closed:	06/03/2008	

. The reviewer has indicated they want to review this project again. Reason chosen by the reviewer: First Review Issues.
. We request a 2nd complete submittal for BDR-Structural on this project as: BDR-Structural (Submit).
. The reviewer has requested more documents be submitted.
. Your project still has 55 outstanding review issues with BDR-Structural (all of which are new).
. The reviewer has not signed off 1 job.
. Last month BDR-Structural performed 932 reviews, 80.0% were on-time, and 87.8% were on projects at less than < 3 complete submittals.

General

Cleared?	Issue Num	Issue Text
☐	1	For a recheck appointment call (619)446-5300. " Please have the project number available when you call for the appointment. The project number is displayed in a "box" near the upper left corner of the Issues report." If you have questions on the architectural or structural review, phone David glanville @ (619) 687-5957 or fax @ (619) 446-5483. (New Issue)
☐	2	This list does not necessarily include all errors and omissions. Plans require correction as indicated by comments before a building permit can be issued. Return a copy of this issues report with corrected plans. (New Issue)
☐	3	It is the responsibility of the architect or engineer of record to assure that all requirements of the latest adopted edition of the California Building Code as well as other regulations and ordinances of the City of San Diego, are satisfied and incorporated in the plans, specifications and structural calculations. (New Issue)
☐	4	To Facilitate Rechecking, Provide an Itemized Written Response to the Issues Noted in this Plan Review Sheet. The Written Response Shall Clearly, Concisely and Comprehensively Address the Issues Raised. (New Issue)
☐	5	Make all corrections on original tracings before resubmitting to the Development Services Department for recheck. Return corrected plans, one set of corrected calculations and one set each of original plans and calculations used for plan review. Supplemental plan review fees may be charged where insufficient progress is made in responding to plan review comments For permit issuance, 2 complete sets of plans and a partial set of plans for the County Assessor will be required. (New Issue)
☐	6	Please indicate here if any changes have been made to the plans that are not a result of corrections from this list. If there are other changes, please briefly describe them and where they are located on the plans. Have changes been made not resulting from this list? O Yes O No (New Issue)

Issues

Cleared?	Issue Num	Issue Text
☐	7	All sheets of plans and first sheet of calculations must be signed by a civil engineer or architect licensed by the State of California. The engineer must stamp the above and note license expiration date; architects must note license number (Sec. 106.3.2, 106.3.4). Please stamp and sign the final sets. (New Issue)
☐	8	Sheet A1.01. The Building Code Data and Project Description specify a one story building with no new floor area created by this project. Sheet A1.03 shows new second and third floor plans. The proposed second and third floors are creating additional floor area. The scope of work must be revised to reflect this new area. (OFFICE USE ONLY: The plan reviewer must update all applicable project attributes in PTS). (New Issue)
☐	9	If the second and third floors meet the requirements of a mezzanine per Section 505, the areas must be classified as such on sheet A1.01. (New Issue)
☐	10	Sheet A1.03. Label all rooms and spaces and provide a detailed description of the intended use for each of the rooms and spaces. (New Issue)
☐	11	All portions of the structure shall be classified with respect to occupancy per Section 302. A review of all requirements based on use and occupancy classification, including the means of egress system per Chapter 10, will be conducted after a detailed description of the intended use and occupancy classification are provided. (New Issue)
☐	12	Specify the ceiling height in all rooms and spaces. Section 1208.2. (New Issue)

Cycle Issues

THE CITY OF SAN DIEGO
Development Services
1222 First Avenue, San Diego, CA 92101-4154

6/23/08 8:26 am

L64A-003A

Cleared?	Issue Num	Issue Text
☐	13	Provide complete plans and engineering calculations for all structural elements, including the stairs, stair landings, floor framing and lateral bracing. (New Issue)
☐	14	Specify if any new ceilings are proposed. Provide complete structural details for any new ceilings. (New Issue)
☐	15	Specify the ICC approval number for the expanded metal grate at the second floor and provide specifications for the grate on the plans. (New Issue)
☐	16	Sheet S1.01. Plans, specifications and design calculations are required where the metal storage containers are altered (e.g. openings for the stairs). (New Issue)
☐	17	Stacked metal storage containers must be connected together at each comer and justified by structural calculations for applicable loads. (New Issue)
☐	18	Double stacked metal storage containers must be provided with a foundation system designed to support the loads. Containers provide with utilities must be supported on footings and anchored to the footings. (New Issue)
☐	19	Specify if any equipment will be attached to the structure shown on sheet S1.01. If yes, show the weight and location of the equipment on the framing plans, and provide engineering calculations for the support and anchorage of the equipment to the structure. (New Issue)
☐	20	Provide a wall/partition section showing: - Type, size and spacing of studs. - Method of attaching top and bottom plates to structure. - Show that tops of partitions are secured to roof or floor framing or provide calculations for support of out-of-plane loads. - Height of partition and suspended ceiling and distance from ceiling to structure above. - Wall sheathing thickness, size and spacing of sheathing fasteners. (New Issue)
☐	21	Provide structural cross sections through the proposed structure (one section through the area with two levels and one section through the area with three floor levels). (New Issue)
☐	22	[1009.2] Stairways shall have a minimum headroom clearance of 80 inches (2032 mm) measured vertically from a line connecting the edge of the nosings. Such headroom shall be continuous above the stairway to the point where the line intersects the landing below, one tread depth beyond the bottom riser. The minimum clearance shall be maintained the full width of the stairway and landing. (New Issue)
☐	23	[1009.3] Stair risers shall be between 4 inches and (102 mm) 7 in. (178 mm) high. Stair treads shall be 11 inches (279 mm) minimum deep. (New Issue)
☐	24	[1008.1.1] The minimum width of each means of egress door opening shall be sufficient for the occupant load thereof and a clear width of not less than 32 in. (813 mm). Clear openings with swinging doors shall be measured between the face of the door, open 90 degrees (1.57 rad) and the stop. Where a door opening includes two door leaves without a mullion, one leaf shall provide a clear opening width of 32 inches (813 mm). The maximum width of a swinging door leaf shall be 48 in. (1219 mm) nominal. The height of doors shall not be less than 80 in. (2032 mm). (New Issue)
☐	25	Guards: Guards shall be located along open-sided walking surfaces, mezzanines, balconies, decks, porches, stairways, ramps and landings that are located more than 30 inches above the floor or grade below. [Sec. 1013.1]. (New Issue)
☐	26	Guards height: Guards shall form a protective barrier not less than 42 inches high measured vertically above the leading edge of the tread, adjacent walking surface or adjacent seatboard. [Sec. 1013.2]. Show this dimension on guards detail. (New Issue)
☐	27	Guards opening limitations: Open guards shall have balusters or ornamental pattems such that a 4-inch-diameter sphere can not pass though any opening. [Sec.1013.3]. Show this dimension on guards detail. (New Issue)
☐	28	Guards details: Show complete structural details for guards. Details as a minimum should indicate the size, spacing and grade of support balusters, size and grade of the support beam structural connection details for support balusters to support beam, etc. . (New Issue)
☐	29	Special inspections, Structural tests and Structural observations shall comply with the applicable provisions of Chapter 17 of the 2007 California Building Code. (New Issue)
☐	30	Provide a 'Statement of Special Inspections' on plans, in accordance with Section 1705. The Statement of Special Inspections shall identify the following: 1) Materials, systems, components and work required to have special inspections or testing, 2) Type and extent of each special inspection, 3) Type and extent of each test, 4) Additional requirements for special inspection or testing for seismic or wind resistance, 5) Identification as to whether special inspection will be performed on a continuous or periodic basis, and 6) Structural observations. [Sec. 106.1, 1704.1.1, 1705, 1709]. (New Issue)
☐	31	Statement of special inspections shall be a complete and comprehensive list, identifying in one location on plans, all work requiring special inspection, testing and, structural observation. The list must be project specific. [Sec. 1705]. (OFFICE USE ONLY: The plan reviewer must update the special inspection attributes in PTS) (New Issue)
☐	32	Properly complete and sign the enclosed Property Owner/Contractor agreement form for special inspection, construction materials testing and, structural observation. It must be submitted at Permit Services Division, prior to issuance of the permit. (New Issue)
☐	33	Contractor's responsibility: The contractor shall submit a written statement of responsibility for construction of items listed in the statement of special inspections prior to the commencement of work. [Sec. 1706.1]. (New Issue)

For questions regarding the 'BDR-Structural' review, please call David Glanville at (619) 687-5957. Project Nbr: 157613 / Cycle: 1

Cycle Issues

Cleared?	Issue Num	Issue Text
☐	34	The contractor's statement of responsibility shall contain: 1) Acknowledgment of awareness of the special requirements contained in the statement of special inspections; 2) Acknowledgement that control will be exercised to obtain conformance with the construction documents approved by the building official; 3) procedures for exercising control within the contractor's organization, the method and frequency of reporting and distribution of the reports; and 4) Identification and qualifications of the person(s) exercising such control and their position(s) in the the organization. [Sec. 1706.1]. (New Issue)
☐	35	Note on plans: "A Property Owner's Final Report form for work required to have special inspections, testing and structural observations must be completed by the property owner, property owner's agent of record, architect of record or, engineer of record and submitted to the Inspection Services Division." (New Issue)

Disabled Access

Cleared?	Issue Num	Issue Text
☐	36	In existing buildings (including those identified as historic buildings) compliance with the California Building Code Disabled Access Provisions is triggered by renovations, structural repairs, alterations (tenant improvements) and additions to these buildings. The term "remodel" here represents all work associated with the renovations, structural repairs, alterations and additions to existing buildings. (New Issue)
☐	37	Sign the following note on the site plan, if applicable: "I am the designer/owner in responsible charge of this tenant improvement project; I have inspected the site/premises and determined that existing conditions are in full compliance with current site accessibility requirements to the extent required by law. Signature: ________________ Date: ____________________." (New Issue)
☐	38	If applicable, sign the following note on the site plan: "I am the designer/owner in responsible charge of this tenant improvement project; I have inspected the restrooms and determined that existing conditions are in full compliance with current site accessibility requirements to the extent required by law. Signature: ________________ Print Name: _______________ Date: ____________________." (New Issue)
☐	39	For the purpose of Title 24, the use of the term Exit Door in Section 1133Bapplies to all doors that provide access, that is, entrances, passage doors, etc. (New Issue)
☐	40	Latching and locking hand-activated doors in a path of travel shall be operable with a single effort by lever type hardware, panic bars, push-pull activating bars, or other hardware designed to provide passage without requiring the ability to grasp the opening hardware. Locked exit doors shall operate as above in egress direction. (Sec. 1133B.2.5.2) (New Issue)
☐	41	Hand-activated door opening hardware shall be centered between 30 inches (762 mm) and 44 inches (1118 mm) above the floor. (Sec. 1133B.2.5.2) (New Issue)
☐	42	The width and height of doorways shall comply with section 1003.3.1.3a. Every required exit doorway shall be of a size as to permit the installation of a door not less than 3 feet (914 mm) in width and not less than 6 feet 8 inches (2032 mm) in height. When installed in exit doorways, exit doors shall be capable of opening at least90 degrees and shall be so mounted that the clear width of the exit is not less than 32 inches (813 mm). (Sec. 1133B.2.2 andFigure 11B-33) (New Issue)
☐	43	There shall be a level and clear floor or landing on each side of a door. The level area shall have a length in the direction of door swing of at least 60 inches (1524 mm) and the length opposite the direction of door swing of 48 inches (1219 mm) as measured at right angle to the plane of the door in its closed position. (Sec. 1133B.2.4.2 and Fig. 11B 26A and B (New Issue)
☐	44	The floor or landing shall be not more than 1/2 inch (12.7 mm) lower than the threshold of the doorway. (Sec. 1133B.2.4.1 and Figures 11B 32) (New Issue)
☐	45	The bottom 10 inches (254 mm) of all doors except automatic and sliding shall have a smooth, uninterrupted surface to allow the door to be opened by a wheelchair footrest without creating a trap or hazardous condition. Where narrow frame doors are used, a 10 inch (254 mm) high smooth panel shall be installed on the push side. (Sec. 1133B.2.6 and Fig. 11B 29) (New Issue)
☐	46	Maximum effort to operate doors shall not exceed 5 pounds (22 N) for exterior and interior doors, applied at right angles to hinged doors and at the center plane of sliding or folding doors. Compensating devices or automatic door operators may be utilized. The maximum effort to operate fire doors may be increased up to 15 pounds (66.72 N) if allowed by the appropriate administrative authority. (Sec. 1133B.2.5) (New Issue)
☐	47	Stairways shall have handrails on each side, and every stairway required to be more than 88 inches (2235 mm) in width shall be provided with not less than one intermediate handrail for each 88 inches (2235 mm) of required width. Intermediate handrails shall be spaced approximately equally across the entire width of the stairway. (Sec. 1133B.4.1.1) (New Issue)
☐	48	Stair handrails shall be 34 to 38 inches (864 to 965 mm) above the nosing of the treads. (Sec. 1133B.4.2.1 and Fig. 11B-35) (New Issue)
☐	49	Stair handrails shall extend a minimum of 12 inches (305 mm) beyond the top nosing and 12 inches (305 mm) plus the tread width beyond the bottom nosing. (Sec. 1133B.4.2.2 and Fig. 11B-35 and 11B-37) (New Issue)
☐	50	Stair handrail ends shall be returned or terminate in newel posts or safety terminals. (Sec. 1133B.4.2.3) (New Issue)
☐	51	Stair handrails projecting from a wall shall have a space of 1 1/2 inches (38 mm) between the wall and the handrail. Handrails may be located in a recess if the recess is a maximum of 3 inches (76 mm) deep and extends at least 18 inches (457 mm) above the top of the rail. (Sec. 1133B.4.2.5 and Fig. 11B 36) (New Issue)

Cycle Issues

THE CITY OF SAN DIEGO
Development Services
1222 First Avenue, San Diego, CA 92101-4154

6/23/08 8:26 am

L64A-003A

Cleared?	Issue Num	Issue Text
☐	52	The handgrip portion of stair handrails shall be not less than 1 1/4 inches (32 mm) or more than 1 1/2 inches (38 mm) in cross-sectional nominal dimension or the shape shall provide an equivalent gripping surface. (Sec. 1133B.4.2.6.1) (New Issue)
☐	53	The upper approach and the lower tread of each stair shall have a clearly contrasting color strip between 2 inches (51 mm) and 4 inches (102 mm) wide parallel to and within 1 inch (25 mm) of the nosing. The strip shall be at least as slip resistant as the other treads of the stair. A painted strip is acceptable. (Sec. 1133B.4.4 and Fig. 11B 35) (New Issue)
☐	54	The stair tread nosing shall not project more than 1 1/2 inches (38 mm) past the face of the riser below. (Sec. 1133B.4.5.2 and Fig. 11B 35) (New Issue)
☐	55	Open stair risers are not permitted. (Sec. 1133B.4.5.3 and Fig. 11B-35) (New Issue)

EXHIBIT C

Cycle Issues

THE CITY OF SAN DIEGO
Development Services
1222 First Avenue, San Diego, CA 92101-4154

6/23/08 8:29 am
Page 1 of 1

L64A-003A

Project Information

Project Nbr: **157613** Title: Raven Dev Simulator/Ride
Project Mgr: Vega, Jama (619) 687-5935 jvega@sandiego.gov

Review Information

Cycle Type:	10 Fire-Plan Check (Submit)	**Submitted:**	Deemed Complete on 06/04/2008
Reviewing Discipline:	Fire-Plan Check	**Cycle Distributed:**	
Reviewer:	**Benoit, Mike** **(619) 446-5456**	**Assigned:**	06/04/2008
		Started:	06/04/2008
Hours of Review:	1.00	**Review Due:**	06/05/2008
Next Review Method:	Fire-Plan Check (Appmt.)	**Completed:**	06/04/2008 **COMPLETED ON TIME**
		Closed:	06/04/2008

. The reviewer has indicated they want to review this project again. Reason chosen by the reviewer: First Review Issues.
. We request a 2nd complete submittal for Fire-Plan Check on this project as: Fire-Plan Check (Appmt.).
. Your project still has 9 outstanding review issues with Fire-Plan Check (all of which are new).
. The reviewer has not signed off 1 job.
. Last month Fire-Plan Check performed 203 reviews, 92.6% were on-time, and 96.1% were on projects at less than < 3 complete submittals.

New Issue Group (943504)

Cleared?	Issue Num	Issue Text
☐	1	Is the office area existing or is it a part of this permit? (New Issue)
☐	2	Label the use of all rooms in this TI. (New Issue)
☐	3	Sheet A1.01 states 49,754 sq ft of existing B occupancy and sheet A1.02 states existing warehouse S-1/F-1. They must match occupancies. (New Issue)
☐	4	What is the proposed occupancy of the simulator? (New Issue)
☐	5	Provide note on plans: Complete plans and specifications for fire-extinguishing systems, including automatic sprinklers and wet and dry standpipes; halon systems and other special types of automatic fire-extinguishing systems; basement pipe inlets; and other fire-protection systems and appurtenances thereto shall be submitted to Fire and Life Safety for review and approval prior to installation. [CFC 901.2] (New Issue)
☐	6	Provide note on plans: Decorative materials shall be maintained in a flame-retardant condition. [Title 19, sect. 3.08, 3.21; CFC 804] (New Issue)
☐	7	Provide note on plans: Fire-extinguishing systems shall be installed in accordance with CFC Section 903. (New Issue)
☐	8	Provide note on plans: All valves controlling the water supply for automatic sprinkler systems and water-flow switches on all sprinkler systems shall be electrically monitored where the number of sprinklers is 20 or more. [CFC 903.4] (New Issue)
☐	9	Provide note on plans: Buildings undergoing construction, alteration or demolition shall be in accordance with CFC Chapter 14 [CFC 1401.1] (New Issue)

For questions regarding the 'Fire-Plan Check' review, please call Mike Benoit at (619) 446-5456. Project Nbr: 157613 / Cycle: 10

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Attorneys for Defendants
KELLY BROUGHTON; THE DEVELOPMENT SERVICES DEPARTMENT OF THE CITY OF SAN DIEGO; AFSANEH AHMADI; THE CITY OF SAN DIEGO

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BLACKWATER LODGE AND TRAINING CENTER, INC., a Delaware Corporation dba BLACKWATER WORLDWIDE, Plaintiff, v. KELLY BROUGHTON, in his capacity as Director of the Development Services Department of the City of San Diego; THE DEVELOPMENT SERVICES DEPARTMENT OF THE CITY OF SAN DIEGO, an agency of the City of San Diego; AFSANEH AHMADI, in her capacity as the Chief Building Official for the City of San Diego; THE CITY OF SAN DIEGO, a municipal entity; and DOES 1-20, Defendants.	Case No. 08cv0926 H (WMC) **DEFENDANTS' MOTION FOR LEAVE TO FILE MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' JOINT MOTION TO DISMISS PLAINTIFF'S COMPLAINT IN EXCESS OF PAGE LIMITS** Date: July 21, 2008 Time: 10:30 a.m. Judge: Hon. Marilyn L. Huff Court Room: 13

Defendants KELLY BROUGHTON, THE DEVELOPMENTAL SERVICES DEPARTMENT OF THE CITY OF SAN DIEGO, AFSANEH AHMADI, and THE CITY OF SAN DIEGO (collectively "City Defendants"), by and through the undersigned counsel, Deputy City Attorney George F. Schaefer, request leave of this Court to file a memorandum of points and authorities in support of the Defendants' motion to dismiss the Plaintiff's Complaint that exceeds the page limits by 2 pages. The following grounds support this motion:

1. On May 23, 2008 Plaintiff Blackwater filed a Complaint in this case for the following: 1) injunctive relief; 2) declaratory judgment; 3) violation of 42 U.S.C. § 1983 (procedural due process); 4) violation of 42 U.S.C. § 1983 (substantive due process); 5) dormant Commerce Clause; 6) violation of Cal. Const., Art. I, § 7(A) (procedural due process); and 6) violation of Cal. Const., Art. I, § 7(A) (equal protection).

2. Defendants have filed a motion to dismiss this Complaint that is 27 pages. Under the local rules, this exceeds the maximum 25-page limit by 2 pages.

3. Good cause exists to allow the Defendants' memorandum to exceed the page limit because of the number of legal claims, number of defendants, and complexity of the issues briefed which include, among other topics, the following: 1) ripeness of the Plaintiff's claims; 2) *Pullman* abstention; 3) *Younger* abstention; 4) Plaintiff's failure to state federal and state law claims; and 5) the Plaintiff's failure to comply with the California Government Claims Act.

Dated: June 23, 2008

MICHAEL J. AGUIRRE, City Attorney

By:

s/George F. Schaefer

George F. Schaefer
Deputy City Attorney
E-mail: GSchaefer@sandiego.gov

Attorneys for Defendants THE CITY OF SAN DIEGO, DEVELOPMENT SERVICES DEPARTMENT OF THE CITY OF SAN DIEGO, KELLY BROUGHTON, and AFSANEH AHMADI

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BLACKWATER LODGE AND TRAINING CENTER, INC., a Delaware Corporation dba BLACKWATER WORLDWIDE, Plaintiff, v. KELLY BROUGHTON, in his capacity as Director the Development Services Department of the City of San Diego; THE DEVELOPMENT SERVICES DEPARTMENT OF THE CITY OF SAN DIEGO, an agency of the City of San Diego; AFSANEH AHMADI, in her capacity as the Chief Building Official for the City of San Diego; THE CITY OF SAN DIEGO, a municipal entity; and DOES 1-20, inclusive, Defendants.	Case No.: 08cv0926 H (WMC) DECLARATION OF SERVICE

I, the undersigned, declare under penalty of perjury that I am over the age of eighteen years and not a party to this action; and that I served the individuals on the service list attached hereto the following documents:

NOTICE OF MOTION AND DEFENDANTS' JOINT MOTION TO DISMISS PLAINTIFF'S COMPLAINT

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF JOINT MOTION TO DISMISS PLANITIFF'S COMPLAINT

DEFENDANTS' MOTION FOR LEAVE TO FILE MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' JOINT MOTION TO DISMISS PLAINTIFF'S COMPLAINT IN EXCESS OF PAGE LIMITS

REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEFENDANTS' JOINT MOTION TO DISMISS PLAINTIFF'S COMPLIANT

DECLARATION OF AFSANEH AHMADI IN SUPPORT OF DEFENDANTS' JOINT MOTION TO DISMISS PLAINTIFF'S COMPLAINT

in the following manner:

1) __ By personally serving the individual named by personally delivering the copies to the offices of the addressee.
Time of delivery: ___________ a.m./p.m.

2) __ By leaving, during usual office hours, copies in the office of the person served with the person who apparently was in charge and thereafter mailing copies (first class mail, postage prepaid) to the person served at the place where the copies were left.

3) **X** **(BY E-FILING).** I hereby certify that on **June 23, 2008**, I electronically filed the above-mentioned documents with the Clerk of the Court by using CM/ECF system which will send a notice of electronic filing, in accordance with the rules governing the electronic filing of documents in the United States District Court for the Southern District of California to the above-mentioned e-mail addresses.

John Nadolenco, Esq. jnadolenco@mayerbrown.com
Christopher Murphy, Esq. cmurphy@mayerbrown.com
Co-Counsel for Plaintiff Blackwater Lodge and Training Center, Inc., dba Blackwater Worldwide

Michael I. Neil, Esq. mneil@neildemott.com
Co-Counsel for Plaintiff Blackwater Lodge and Training Center, Inc., dba Blackwater Worldwide

Executed: **June 23, 2008** at San Diego, California.

Maria Cook
MARIA COOK